CLERK'S COPY.

AGREED RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1898.

No. 230 63, 11

THE CHICAGO, MILWAUKEE AND ST. PAUL RAILWAY COMPANY, PETITIONER,

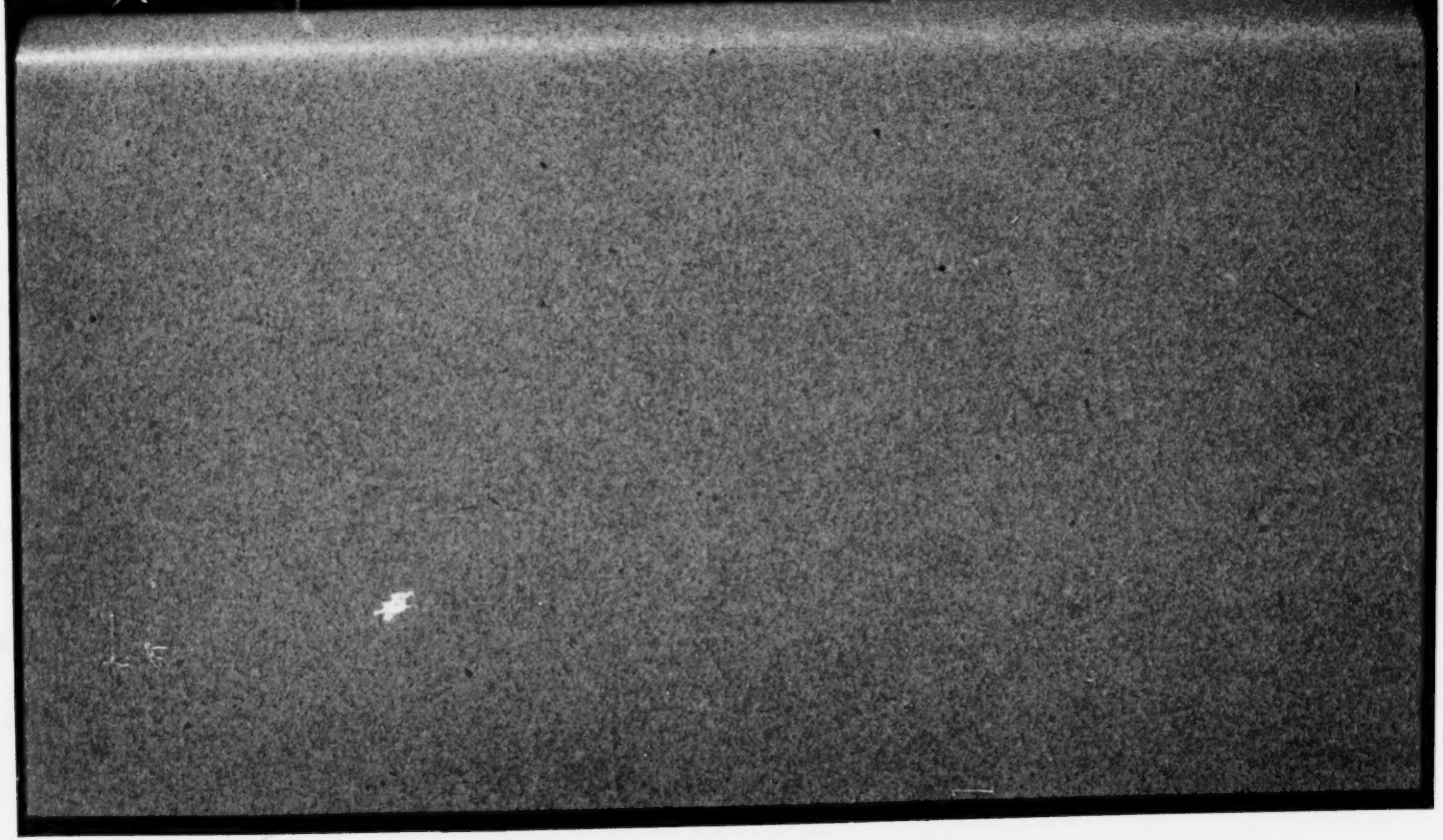
vs.

C. H. BOSWORTH, RECEIVER OF THE CHICAGO, PEORIA AND ST. LOUIS RAILWAY COMPANY, AND THE CHICAGO, PEORIA AND ST. LOUIS RAILWAY COMPANY.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

PETITION FOR CERTIORARI FILED APRIL 28, 1898.
CERTIORARI AND RETURN FILED MAY 26, 1898.

(16,856.)



(16,856.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1898.

No. 283.

THE CHICAGO, MILWAUKEE AND ST. PAUL RAILWAY COMPANY, PETITIONER,

vs.

C. H. BOSWORTH, RECEIVER OF THE CHICAGO, PEORIA AND ST. LOUIS RAILWAY COMPANY, AND THE CHICAGO, PEORIA AND ST. LOUIS RAILWAY COMPANY.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

INDEX.

	Original.	Print.
Caption	*a*	1
Extracts from transcript of record from circuit court of the United States for southern district of Illinois	*b*	1
Intervening petition of the C., M. & St. P. R'y Co.	23	2
Report of master	59	5
Exceptions of receiver to report of master	61	6
Decree, April 5, 1897	63	7
Petition of receiver for appeal	347	9
Assignment of errors by receiver	348	9
Bond on appeal by receiver	349	10
Order allowing appeal of receiver	350	11
Petition of C., P. & St. L. R'y Co. to be made party and for leave to appeal	350	12
Assignment of errors by C., P. & St. L. R'y Co.	352	13
Bond on appeal of C., P. & St. L. R'y Co.	353	14
Order making C., P. & St. L. R'y Co. party defendant and allowing appeal, &c.	354	15
Decree, February 25, 1898	392	16
Writ of certiorari	398	16
Return to writ of certiorari	400	17
Stipulation as to return	401	17
Stipulation to omit parts of record in printing	403	18

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., SEPTEMBER 15, 1898.

a *Transcript of Record.*

In the United States Circuit Court of Appeals for the Seventh Circuit, October Term, A. D. 1896.

MERCANTILE TRUST COMPANY
vs.
CHICAGO, PEORIA & ST. LOUIS RAILWAY COMPANY ET AL. } No. 442.

In the matter of the intervening petition of the Chicago, Milwaukee & St. Paul Railway Company.

C. H. BOSWORTH, Receiver, etc., Appellant,
vs.
THE CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, Appellee.

Appeal from the circuit court of the United States for the southern district of Illinois.

Mr. Bluford Wilson, Mr. Philip B. Warren, counsel for appellant; Mr. George R. Peck, Mr. Berton Hanson, Mr. George P. Carey, counsel for appellee.

Transcript of record filed August 20, 1897.
Printed record filed Sep. 4, 1897.

OLIVER T. MORTON, *Clerk.*

b-22 In the Circuit Court of the United States for the Southern District of Illinois. In Chancery.

MERCANTILE TRUST COMPANY
vs.
CHICAGO, PEORIA & ST. LOUIS RAILWAY COMPANY *et al.* } Consolidated Cause.

In the matter of the intervening petition of the Chicago, Milwaukee & St. Paul Railway Company.

* * * * * * *

23 Afterwards, to wit, on the twenty-ninth day of January, in the year of our Lord one thousand eight hundred and ninety-five, came the Chicago, Milwaukee & St. Paul Railway Company, by its solicitors, and filed in the clerk's office of said court its intervening petition, which is as follows, to wit:

Intervening Petition of the C., M. & St. P. R. Co.

In the Circuit Court of the United States in and for the Southern District of Illinois.

THE MERCANTILE TRUST COMPANY OF NEW YORK, Complainant, vs. THE CHICAGO, PEORIA & ST. LOUIS RAILWAY COMPANY, Defendant. } Consolidated Cause.

Intervening petition of the Chicago, Milwaukee & St. Paul Railway Company.

To the honorable the judges of said court:

Comes now your petitioner, The Chicago, Milwaukee & St. Paul Railway Company, a corporation duly organized and existing under and by virtue of the laws of the State of Wisconsin, having its principal office at the city of Milwaukee, and being a citizen of the said State of Wisconsin, intervening herein, and by leave of court first had and obtained, files this its petition, and complaining of the Chicago, Peoria & St. Louis Railway Company, a corporation duly organized and existing under and by virtue of the laws of the State of Illinois, and having its principal office and place of business at Springfield, therein states:

24 That your petitioner, as such corporation, owns and operates, about six thousand miles of railroad in the States of Wisconsin, Michigan, Minnesota, North and South Dakota, Illinois, Iowa, and Missouri, and as such was at the dates and times hereinafter mentioned a common carrier of persons and property, and was the owner of the cars hereinafter mentioned. That the defendant Chicago, Peoria, & St. Louis Railway Company, at the times and dates hereinafter mentioned, owned and operated a line of road from the city of Chicago by way of Peoria to East St. Louis in the State of Illinois, and was also a common carrier of persons and property. That the defendant as such common carrier, on the 28th day of October, 1894, had in its possession at said East St. Louis 38 freight cars of your petitioner, and that while said 38 freight cars were in the possession of said defendant railway company at its East St. Louis station, and while said defendant held said 38 cars as a common carrier thereof, and while the same were still in transit, and on their way to destination, and in possession of and under the control of the said defendant railway company, the same were destroyed by fire on the evening of said 28th day of October, 1894. That said 38 cars so destroyed were of the value of seventy-five hundred (7,500) dollars, and on account of the loss, damage, and destruction thereof by fire as aforesaid, your petitioner has suffered damage to that amount.

The following is a statement showing the initials, numbers, value, depreciation, salvage and net loss of each one of said 38 cars.

Statement of cars burned at East St. Louis, Ills., during the night of October 28th, 1894, showing the value of each car, less depreciation for age the salvage and the net loss sustained on each car.

Initials.	Numbers.	Value.	Depreciation.	Salvage.	Net loss.
C., M. & St. P.	3218	$440	$264.00	$60.62	$115.38
"	3524	440	264.00	63.25	112.75
"	4126	440	264.00	60.62	115.38
"	6364	440	264.00	63.25	112.75
"	3728	440	264.00	63.25	112.75
"	6842	440	264.00	63.25	112.75
M. & N. R. R. Co.	1154	500	155.06	69.98	274.96
"	1232	500	155.06	69.98	274.96
C., M. & St. P.	37506	475	158.78	69.98	246.24
"	1100	440	264.00	63.25	112.75
"	2430	440	264.00	60.62	115.38
"	2598	440	264.00	63.25	112.75
"	680	440	264.00	63.25	112.75
"	12	440	264 00	63.25	112.75
25 "	10536	440	259.60	60.62	119.78
"	10720	440	259.60	60.62	119.78
"	10071	440	261.45	60.62	117.93
"	11836	440	255.90	63.25	120.85
"	12886	440	254.97	63.25	121.78
"	12336	440	257.75	60.62	121.63
"	15944	475	274.19	69.98	130.83
"	16502	440	253.99	63.25	122.76
"	17272	475	266.74	69.98	138.28
"	18126	475	266.74	69.98	138.28
"	20022	515	268.86	69.98	176.16
"	31098	475	236.90	69.98	168.12
"	31204	515	235.75	69.98	209.32
"	32194	475	234.50	69.98	170.52
"	32986	475	234.50	69.98	170.52
"	33090	475	195.58	69.98	209.44
"	33134	475	195.58	69.98	209.44
"	34908	475	292.69	69.98	212.33
"	34574	475	194.14	69.98	210.88
"	38108	475	252.32	69.98	192.70
"	43080	500	109.63	85.73	344.64
"	43222	500	109.63	85.73	344.64
"	46064	500	105.47	85.73	348.80
"	46992	500	90.94	85.73	363.33

Your petitioner further shows that on the 21st day of September, 1893, in the suit of The Mercantile Trust Company of New York, complainant, against The Chicago, Peoria and St. Louis Railway Company, defendant, in the circuit court of the United States, for the southern district of Illinois, Mr. C. H. Bosworth was, by an order duly entered therein, appointed the receiver of, and placed in charge of the property, rights and franchises of said defendant railway company, and as such receiver, has, ever since the date of his appointment been engaged in managing and operating the railroad of said defendant railway company in the transportation of persons and property over and upon the same, and that the liability of such railway company to your petitioner was incurred while its railroad was being operated by said receiver, and that the claim and demand

of your petitioner herein is of a kind, and accrued within the time which entitled it to a priority over debts and demands secured by mortgages, and to a payment by said receiver out of any funds which may come into his hands while operating the railroad of said defendant railway company.

26-58 Wherefore your petitioner prays that its said claim of seventy-five hundred ($7,500) dollars may be allowed against the said receiver appointed as aforesaid; that said claim be declared a lien paramount to all other claims against the property of said Chicago, Peoria & St. Louis Railway Company, prior in right to the claims of mortgages, and a lien upon any money in the hands of said receiver, not otherwise appropriated, and that the said receiver be ordered to pay the said amount out of any moneys that may come into his hands, or out of the proceeds of the sale of the property of the said railway company, and before any distribution shall be made of the same, and for such other and further orders and decrees as to the court shall seem meet and proper.

THE CHICAGO MILWAUKEE & ST. PAUL RAILWAY COMPANY,
By ROSWELL MILLER, *Its President.*

BURTON HANSON &
GEORGE P. CARY, *Of Counsel.*

Affidavit of Roswell Miller.

UNITED STATES OF AMERICA, *Northern District of Illinois,* } ss:

Roswell Miller, being duly sworn, deposes and says that he is president of The Chicago, Milwaukee & St. Paul Railway Company, the intervenor herein; that he has read the foregoing petition and knows the contents thereof, and that the same is true as he verily believes.

ROSWELL MILLER.

Subscribed and sworn to before me this 26th day of January, 1895.

[SEAL.] W. D. MILLARD,
Notary Public.

(Indorsed:) Filed January 29th, 1895. James T. Jones, clerk.

* * * * * * *

59 Afterwards, to wit, on the 10th day of April in the year of our Lord one thousand eight hundred and ninety-six, came Stuart Brown, Esq., one of the masters of this court, and filed in the clerk's office of said court his report, on said intervening petition, which report is as follows, to wit:

Report of Master in Chancery. Filed April 10, 1896.

In the Circuit Court of the United States for the Southern District of Illinois.

MERCANTILE TRUST COMPANY
vs.
CHICAGO, PEORIA & ST. LOUIS. } Consolidated Cause.

Intervening petition of Chicago, Milwaukee & St. Paul Railway Company.

Your subscriber, one of the masters in chancery of this honorable court, to whom the said intervention in the above-styled cause
60 has been referred, would respectfully report that he has taken evidence, heard oral argument and had briefs presented upon the questions raised by the proof, and herewith he offers his conclusions.

The pleadings are the same in effect as were set out in the report of your subscriber on claim of T. McMichael & Son filed April 8th, 1896, and to which reference is hereby made. The difference is shown in the amended stipulation as to proof, which in this intervention was as follows:

"That the Chicago, Milwaukee & St. Paul Railway Company is a corporation, as alleged, having its principal office at the city of Milwaukee, Wisconsin; that on the 28th day of October, 1894, it was the owner of thirty-eight (38) cars mentioned and described in its petition on file herein; that during the evening of said 28th day of October, the said cars while on the tracks of the Terminal Railroad Association of St. Louis in its yard at East St. Louis, commonly used by the receiver herein, under the agreement between said association and the Chicago, Peoria & St. Louis Railway Company dated August 1, 1892, were damaged by fire at East St. Louis, in the State of Illinois; that each one of said cars was consigned as per bill of lading and waybills introduced in evidence; that the amount of damage to each of said cars except car No. 12, is as stated in the petition of said company under the heading 'Net loss & salvage,' and that the total amount of damage to said cars is $9,033.73, which amount the Chicago, Milwaukee & St. Paul Railway Company is entitled to recover, if it shall be adjudged that it is entitled to recover in this proceeding."

The owners of the cars destroyed in the fire of October 28, 1894, have the same claim against the C., P. & St. L. railway on the Terminal Association that the owners of their contents had. *P. & P. U. R'y v. C., R. I. & P. R'y*, 109 Ill., 135; 25 Fed. Rep., 317.

The only question then remaining in this intervention is: Were they delivered to Terminal railroad as a common carrier, or were they held by the C., P. & St. L. as a common carrier?

The evidence as to their delivery was the same as that in T. McMichael intervention, and my conclusions are the same for the reasons stated in that report.

I reach, therefore, the opinion that the intervenor has a just claim against the receiver in the sum of $9,033.73, and interest thereon at the rate of five per cent. per annum from date of loss to present date, and that it should be paid as the court may direct.

All of which is respectfully reported this 7th day of April, 1896.

STUART BROWN, *M. C.*

(Indorsed:) Filed April 10, 1896. James T. Jones, clerk.

61 Then afterwards, to wit: on the 27th day of April, in the year last aforesaid, came C. H. Bosworth, the receiver herein, and filed in the clerk's office of said court his exceptions to said report of said master on said intervening petition, which exceptions are as follows, to wit:

Exceptions of Receiver to Report of Master.

In the Circuit Court of the United States for Southern District of Illinois.

MERCANTILE TRUST COMPANY
vs.
CHICAGO, PEORIA AND ST. LOUIS RAILWAY Company. } Consolidated Cause.

In the matter of the intervening petition of the Chicago, Milwaukee and St. Paul Railway Company.

Exceptions of the Receiver to the Master's Report.

Now comes C. H. Bosworth, receiver herein, and excepts to the report of Stuart Brown, master in chancery, filed in the above-entitled matter on the 10th day of April, 1896, and for cause of exception, shows:

First. For that the said master has failed and refused to report that the destination of the cars of intervenor, as shown by the evidence, was East St. Louis, Illinois.

Second. For that the said master has failed and refused to report his conclusions as to whether or not the cars of intervenor, at the time they were destroyed, were being held by the Terminal Railroad Association of St. Louis or the receiver herein as a common carrier or a warehouseman; whereas, the said master should have reported that said cars, at the time of their loss, were in the custody and under the complete control of the Terminal Railroad Association of St. Louis as a warehouseman.

Third. For that the said master has failed and refused to report his conclusions as to the effects of the contract of carriage entered into by said intervenor, containing clauses exempting it from loss by fire; whereas said master should have reported that it appeared from the evidence that said intervenor entered into certain contracts of carriage, containing a clause exempting itself as a carrier,

from liability by fire, and that the benefit of said contract inured to each of the connecting carriers, including the receiver.

Fourth. For that the said master has failed and refused to
62 report that the cars in question, at the time of their damage and destruction, had been delivered by the receiver to the Terminal Railroad Association of St. Louis in the due course of business, and were then in the custody of, and under the complete control of said Terminal Railroad Association of St. Louis.

Fifth. For that the said master has reported that the intervenor has a just claim against the receiver in the sum of $9,033.73, and interest thereon at the rate of 5 % per annum, from date of loss to April 7, 1896, and that it should be paid as the court may direct; whereas, the said master should have reported that said intervenor was not entitled to recover from the receiver for the loss and damage occurring to said cars by reason of said fire.

And thereupon this receiver prays that the said master's report may be annulled and set aside, and that a decree may be entered on said intervening petition, dismissing the same at petitioner's cost.

C. H. BOSWORTH, *Receiver,*
By BLUFORD WILSON &
P. B. WARREN,
His Solicitors.

(Indorsed:) Filed April 27, 1896. James T. Jones, clerk.

* * * * * * *

63 Afterwards, to wit: on the 5th day of April, in the year last aforesaid, the following further proceedings were had in said court in said cause and entered of record, to wit:

Decree, April 5, 1897.

In the Circuit Court of the United States for Southern District of Illinois.

THE MERCANTILE TRUST COMPANY OF NEW YORK, Complainant, *vs.* CHICAGO, PEORIA & ST. LOUIS RAILWAY COMPANY *et al.*, Defendants.	In Equity. Consolidated Cause.

In the matter of the intervening petition of the Chicago, Milwaukee & St. Paul Railway Company.

And now on the 5th day of April, A. D. 1897, came again the said intervenor, The Chicago, Milwaukee & St. Paul Railway Company, by Burton Hanson and George P. Cary, its counsel, and the said Mercantile Trust Company of New York, by Bluford Wilson, its counsel, and also C. H. Bosworth, receiver herein, by Bluford Wilson and P. B. Warren, his counsel, and this cause coming on to be fur-

ther heard upon the exceptions of the said C. H. Bosworth, receiver, to the report of the master in chancery herein, and the court having heard argument of counsel, and being sufficiently advised, doth order and adjudge and decree that said exceptions be and they are hereby overruled, and the report of said master is in all things confirmed.

It is further ordered, adjudged and decreed by the court, that said C. H. Bosworth, receiver, pay as a part of the expenses of his receivership within ninety days from the entry of this decree, the said sum found to be due to said intervenor, Chicago, Milwaukee & St. Paul Railway Company, to wit: the sum of nine thousand, thirty-three and $\frac{73}{100}$ dollars ($9,033.73), with interest thereon at the rate of five (5%) per cent. per annum from the 10th day of April, 1896, the date of the filing of the master's report, to the entry of this decree, making a total of principal and interest in the sum of nine thousand, four hundred and eighty-four dollars and seventy-three cents, and costs, inclusive of clerk's fees, amounting to sixteen dollars and no cents, making a total of principal, interest and costs of nine thousand, five hundred dollars and seventy-three cents ($9,500.73).

61–346

It is further ordered, adjudged and decreed that inasmuch as the aforesaid amount is properly chargeable to the expenses of the receivership of C. H. Bosworth herein, this decree for the payment of said amount to said intervenor, Chicago, Milwaukee & St. Paul Railway Company, be, and the same hereby is, adjudged to be a lien upon all the property and income of said defendant, Chicago, Peoria & St. Louis Railway Company, as it existed and was known during said receivership, in favor of the intervenor, Chicago, Milwaukee & St. Paul Railway Company, and upon all of the property and income of the purchaser or purchasers, purchased at the foreclosure sale heretofore had, their successors or assigns.

It is further ordered, adjudged and decreed that said lien be, and the same is hereby adjudged to be a lien upon all the property and income of said defendant, Chicago, Peoria & St. Louis Railway Company, its said purchaser or purchasers, their successors or assigns, prior and superior to the lien of the mortgage given by said defendant railway company to the Mercantile Trust Company of New York, and to any and all mortgages that may have been placed upon said property by said defendant, or said purchaser or purchasers, their successors or assigns, or which may hereafter be placed upon said property.

And the court having in the original decree and confirmation of sale thereunder specially reserved the right of caption of the property of said Chicago, Peoria & St. Louis Railway Company to enforce the payment of the sum or sums that might be decreed to be liens on said property, it is further ordered, adjudged and decreed that if said amount herein adjudged and decreed to be paid to said intervenor, Chicago, Milwaukee & St. Paul Railway Company, is not paid within the time herein limited, that said C. H. Bosworth, as receiver, is hereby directed to take possession of all said railroad property, together with its income, rolling stock and real estate, and

operate the same, and out of the net earnings pay the amount due on this decree to the Chicago, Milwaukee & St. Paul Railway Company.

* * * * * * *

347 *Petition of Receiver for Appeal, April 5, 1897.*

In the Circuit Court of the United States for Southern District of Illinois.

MERCANTILE TRUST COMPANY
vs.
CHICAGO, PEORIA & ST. LOUIS RAILWAY COMPANY. } Consolidated Cause.

In the matter of the intervening petition of the Chicago, Milwaukee & St. Paul Railway Company.

Petition for Appeal.

The petition of C. H. Bosworth, receiver herein, showeth unto your honor that a final decree was entered in the above-entitled cause on the 5th day of April, 1897, whereby it was ordered, adjudged and decreed that your petitioner should pay to the said Chicago, Milwaukee & St. Paul Railway Company the sum of $9,033.73; your petitioner further states to your honor that he has assigned errors upon the record in said cause, specifying errors, as he alleges, in the record and decree aforesaid. He therefore prays that your honor will grant an appeal from the said judgment and decree to your petitioner, upon condition that he enters into bond in the sum of five hundred dollars, with surety to be approved by this honorable court, in such time as your honor shall order and decree.

C. H. BOSWORTH, *Receiver*,
By BLUFORD WILSON,
PHILIP BARTON WARREN,
His Solicitors.

348 *Assignment of Errors by Receiver.*

In the Circuit Court of the United States for Southern District of Illinois.

MERCANTILE TRUST COMPANY
vs.
CHICAGO, PEORIA & ST. LOUIS RAILWAY COMPANY. } Consolidated Cause.

In the matter of the intervening petition of the Chicago, Milwaukee & St. Paul Railway Company.

Assignment of Errors.

And now comes C. H. Bosworth, receiver herein, by Bluford Wilson and P. B. Warren, his solicitors, and says there is manifest error in the record and proceedings in the above-entitled judgment and decree; and specifies the following, to wit:

1. The court erred in overruling the exceptions filed by the receiver to the report of the master.

2. The court erred in failing and refusing to sustain the exceptions filed by the receiver to the report of the master.

3. The court erred in ordering and adjudging that the petitioner was entitled to a valid and first lien on the property of the defendant railway company ahead of the mortgage indebtedness, and upon all of the property and income of the purchasers, purchased at the foreclosure sale of said railway property.

4. The court erred in failing and refusing to order, adjudge and decree that the claim of the intervenor was not entitled to a valid and first lien on the property of the defendant railway company, ahead of the mortgage indebtedness, and upon all of the property and income of the purchasers, purchased at the foreclosure sale of said railway property.

4. The court erred in ordering, adjudging and decreeing that said receiver pay to the intervening petitioner the sum of $9,033.73 with interest thereon from the date of the filing of the master's report, together with the costs in this case.

6. The court erred in ordering, adjudging and decreeing that if said amount was not paid by the receiver within the time there limited, the said receiver be directed to take possession of all of said property and operate the same, and out of the net earnings, pay said amount.

Whereby, the plaintiff in error prays that said judgment and decree be reversed and annulled, with directions to the lower court to dismiss said intervening petition.

BLUFORD WILSON,
PHILIP BARTON WARREN,
Solicitors for C. H. Bosworth, Receiver.

349 *Bond on Appeal by C. H. Bosworth, Receiver.*

In the Circuit Court of the United States for Southern District of Illinois.

MERCANTILE TRUST COMPANY
vs.
CHICAGO, PEORIA & ST. LOUIS RAILWAY Company. } Consolidated Cause.

In the matter of the intervening petition of the Chicago, Milwaukee & St. Paul Railway Company.

Bond.

Know all men by these presents, that we, C. H. Bosworth, as receiver of the Chicago, Peoria & St. Louis Railway Company as principal, and Bluford Wilson as surety, are held and firmly bound unto the Chicago, Milwaukee and St. Paul Railway Company in the penal sum of five hundred dollars, for the payment of which, well and truly to be made, the said receiver, as such, binds himself and

his successor, and the said surety binds himself, his heirs and personal representatives, jointly and severally, by these presents.

Dated this 31st day of May, 1897.

The condition of this obligation is such that whereas, on the 5th day of April, 1897, in the circuit court of the United States, for the southern district of Illinois, in the above-entitled cause, it was ordered, adjudged and decreed by the court that the above-bounden C. H. Bosworth, as receiver, should pay over to the said Chicago, Milwaukee & St. Paul Railway Company the sum of $9,033.73 and from which decree the said receiver has appealed to the United States circuit court of appeals for the seventh circuit, and upon the condition that the receiver should enter into bond in the sum of five hundred dollars with surety to be approved by the court:

Now, therefore, if the said receiver shall well and truly, without delay, prosecute the said appeal with effect, and shall pay all costs and damages that may be adjudged against him, by reason of said appeal, and all costs that may accrue therein in case of dismissal of said appeal by appellant, then this obligation to be null and void, otherwise to remain in full force and effect.

C. H. BOSWORTH,
As Receiver of the Chicago, Peoria & St. Louis Railway Company. [SEAL.]
BLUFORD WILSON. [SEAL.]

Approved:
WILLIAM J. ALLEN,
United States District Judge.

350 *Order Allowing C. H. Bosworth, Receiver, an Appeal and Approving Bond.*

In the Circuit Court of the United States for Southern District of Illinois.

MERCANTILE TRUST COMPANY *vs.* CHICAGO, PEORIA & ST. LOUIS RAILWAY Company.	Consolidated Cause.

In the matter of the intervening petition of the Chicago, Milwaukee & St. Paul Railway Company.

Order Allowing Appeal and Approving Bond.

Now on this first day of June, 1897, the same being one of the days of the January term, A. D. 1897, of this court, comes C. H. Bosworth, receiver herein, and files his petition for appeal from the order and decree of the court entered herein on the 5th day of April, 1897; and it appearing to the court that said petition is in due form, it is hereby—

Ordered, adjudged and decreed that the prayer of said petition be, and the same is hereby granted; that the appeal be, and the same is hereby allowed to said C. H. Bosworth, receiver, from the said

order and decree of April 5th, 1897, to the United States circuit court of appeals for the seventh circuit, upon the said C. H. Bosworth, as such receiver, entering into bond in the sum of five hundred dollars, with surety to be approved by this court; which bond it appears to the court is herewith submitted and approved.

Petition of the C., P. & St. L. R'y Co.

In the Circuit Court of the United States, Southern District of Illinois.

MERCANTILE TRUST COMPANY ET AL.
vs.
CHICAGO, PEORIA & ST. LOUIS RAILWAY Company *et al.* } Consolidated Cause.

In the matter of the intervening petition of the Chicago, Milwaukee & St. Paul Railway Company.

Application of the Chicago, Peoria & St. Louis Railroad Company of Illinois to be Made Party Defendant and for Leave to Appeal.

Now comes the Chicago, Peoria & St. Louis Railroad Company of Illinois, and shows to this honorable court that on the 10th
351 day of July, 1895, a decree was entered in the original foreclosure cause pending in this court, in which The Mercantile Trust Company *et al.* were complainants, and The Chicago, Peoria & St. Louis Railway Company *et al.* were defendants, for the foreclosure and sale of all the property of said defendant railway company; that in and by said decree it was provided, among other things, that the purchasers of said property and their assigns might be made parties to all intervening petitions filed in such original cause, and might also appeal from any decree that might be entered in this court upon said intervening petitions; that on the 21st day of September, 1895, pursuant to said decree of foreclosure and sale, Stuart Brown, Esq., as master commissioner, sold said property to a reorganizing committee, and pursuant to a decree of this court entered herein on the 1st day of February, 1896, executed a deed to said property to the assignees of said reorganization committee, to wit: the Chicago, Peoria & St. Louis Railroad Company of Illinois; your petitioner further respectfully shows that in and by said decree of February 1, 1896, it was provided that the said Chicago, Peoria & St. Louis Railroad Company of Illinois, shall be substituted in place of said reorganization committee as a party to this cause, and shall have the right to appear herein and to procure and defend such proceedings as it may be advised for the protection of its interests; and shall have all the other rights and privileges to which, under said decree of foreclosure and the order confirming the sale thereunder, the purchaser at such sale is entitled.

Your petitioner further respectfully represents unto this court, that on the 5th day of April, 1897, a final decree was entered in the

above-entitled cause, directing C. H. Bosworth, receiver, to pay to said intervening petitioner the sum of $9,033.73; and this petitioner further represents unto this court that it has assigned errors, which it charges were made by this court against it in the matter of said intervening petitions, particularly specifying the errors complained of, and now here presents said assignment of errors to be filed with the clerk of this court; and

Thereupon, this petitioner prays that it may be made a party to said intervening petition, and that this court will grant to it an appeal from said final decree; and that the amount of bond and the time within which such bond and certificate of evidence shall be filed may be fixed by this court.

CHICAGO, PEORIA & ST. LOUIS RAILROAD COMPANY OF ILLINOIS,
By BLUFORD WILSON, *Its Solicitor.*

352 *Assignment of Errors by the C., P. & St. L. R'y Co.*

In the Circuit Court of the United States for Southern District of Illinois.

MERCANTILE TRUST COMPANY
vs.
CHICAGO, PEORIA AND ST. LOUIS RAILWAY Company. } Consolidated Cause.

In the matter of the intervening petition of the Chicago, Milwaukee and St. Paul Railway Company.

Assignment of Errors.

And now comes the Chicago, Peoria and St. Louis Railroad Company of Illinois, by Bluford Wilson and P. B. Warren, its solicitors, and says there is manifest error in the record and proceedings in the above-entitled judgment and decree; and specifies the following, to wit:

1. The court erred in overruling the exceptions filed by the receiver to the report of the master.

2. The court erred in failing and refusing to sustain the exceptions filed by the receiver to the report of the master.

3. The court erred in ordering and adjudging that the petitioner was entitled to a valid and first lien on the property of the defendant railway company ahead of the mortgage indebtedness, and upon all of the property and income of the purchasers purchased at the foreclosure sale of said railway property.

4. The court erred in failing and refusing to order, adjudge and decree, that the claim of the *inventor* was not entitled to a valid and first lien on the property of the defendant railway company ahead of the mortgage indebtedness, and upon all of the property and income of the purchasers, purchased at the foreclosure sale of said railway property.

5. The court erred in ordering, adjudging and decreeing that said receiver pay to the intervening petitioner the sum of $9,033.73, with interest thereon from the date of the filing of the master's report, together with the costs in this case.

6. The court erred in ordering, adjudging and decreeing that if said amount was not paid by the receiver, within the time there limited, the said receiver be directed to take possession of all of said property and operate the same, and out of the net earnings pay said amount.

Whereby, the plaintiff in error prays that said judgment and decree be reversed and annulled, with directions to the lower court to dismiss said intervening petition.

BLUFORD WILSON,
PHILIP BARTON WARREN,
Solicitors for Chicago, Peoria and St. Louis Railroad Company of Illinois.

353 *Bond on Appeal of the C., P. & St. L. R'y Co.*

In the Circuit Court of the United States for Southern District of Illinois.

MERCANTILE TRUST COMPANY
vs.
CHICAGO, PEORIA & ST. LOUIS RAILWAY Company. } Consolidated Cause.

In the matter of the intervening petition of the Chicago, Milwaukee & St. Paul Railway Company.

Bond.

Know all men by these presents, that we, The Chicago, Peoria & St. Louis Railroad Company of Illinois, as principal, and Bluford Wilson as surety are held and firmly bound unto the said Chicago, Milwaukee & St. Paul Railway Company, in the penal sum of five hundred dollars, for the payment of which, well and truly to be made, the said Chicago, Peoria & St. Louis Railroad Company of Illinois as such binds itself and its successor, and the said surety binds himself, his heirs, and personal representatives, jointly and severally by these presents.

Dated this 17th day of July, 1897.

The condition of this obligation is such that whereas, on the 5th day of April, 1897, in the circuit court of the United States for the southern district of Illinois, in the above-entitled cause, it was ordered, adjudged and decreed by the court that the above-bounden Chicago, Peoria & St. Louis Railroad Company of Illinois should pay over to the said Chicago, Milwaukee & St. Paul Railway Company the sum of $9,033.73, and from which decree the said Chicago, Peoria & St. Louis Railroad Company of Illinois, has appealed to the United States circuit court of appeals for the seventh circuit, and upon the condition that the Chicago, Peoria & St. Louis Railroad

Company of Illinois should enter into bond in the sum of five hundred dollars, with surety approved by the court:

Now therefore, if the said Chicago, Peoria & St. Louis Railroad Company of Illinois shall well and truly, without delay, prosecute the said appeal with effect, and shall pay all costs and damages that may be adjudged against it by reason of said appeal, and all costs that may accrue therein in case of dismissal of said appeal by appellant, then this obligation to be null and void, otherwise to remain in full force and effect.

CHICAGO, PEORIA & ST. LOUIS RAILROAD COMPANY OF ILLINOIS,
By F. W. HUIDEKOPER, *Pres't.* [SEAL.]
BLUFORD WILSON. [SEAL.]

Attest: CHAS. D. MEYER, *Secretary.* [SEAL.]

Approved:
WILLIAM J. ALLEN,
United States District Judge.

354–391 *Order Making C., P. & St. L. R'y Co. Party Defendant, Allowing Appeal, and Approving Bond.*

In the Circuit Court of the United States, Southern District of Illinois.

MERCANTILE TRUST COMPANY ET AL.
vs.
CHICAGO, PEORIA & ST. LOUIS RAILWAY COMPANY *et al.* } Consolidated Cause.

In the matter of the intervening petition of the Chicago, Milwaukee & St. Paul Railway Company.

Order of Court Making The Chicago, Peoria & St. Louis Railroad Company of Illinois Party Defendant and Granting Leave to Appeal from Final Decree.

This cause coming on to be further heard upon the application of the Chicago, Peoria & St. Louis Railroad Company of Illinois to be made a party defendant to the above-entitled intervening petition, and for leave to appeal from the decree entered in this cause on the 5th day of April, 1897, and the court being fully advised in the premises, upon consideration thereof, does hereby grant leave unto said Chicago, Peoria & St. Louis Railroad Company of Illinois to be made party defendant to said intervening petition; and does also hereby grant unto said Chicago, Peoria & St. Louis Railroad Company of Illinois an appeal from said final decree of this court to the circuit court of appeals of the United States for the seventh circuit, upon the said Chicago, Peoria & St. Louis Railroad Company of Illinois entering into bond in the sum of five hundred dollars ($500.00) with approved surety.

* * * * * * *

392–397 And afterwards, on the same day, to wit: on the twenty-fifth day of February, 1898, in the October term last aforesaid, the following further proceedings were had and entered of record, to wit:

FRIDAY, *February* 25, 1898.

Before Hon. William A. Woods, circuit judge; Hon. James G. Jenkins, circuit judge; Hon. John W. Showalter, circuit judge.

MERCANTILE TRUST COMPANY
vs.
CHICAGO, PEORIA & ST. LOUIS RAILWAY COMPANY ET AL.

In the Matter of the Intervening Petition of Chicago, Milwaukee & St. Paul Railway Company. } 442.

C. H. BOSWORTH, Receiver, etc.,
vs.
CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY.

Appeal from the circuit court of the United States for the southern district of Illinois.

Decree. Entered Feb. 25, 1898.

This cause came on to be heard on the transcript of the record from the circuit court of the United States for the southern district of Illinois and was argued by counsel.

On consideration whereof, it is now here ordered, adjudged and decreed, by this court, that the decree of the said circuit court, in this cause be, and the same is hereby reversed with costs; and that this cause be, and the same is, hereby remanded to the said circuit court with directions to dismiss the petition.

* * * * * * *

398 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable the judges of the United States circuit court of appeals for the seventh circuit, Greeting:

[Seal of the Supreme Court of the United States.]

Being informed that there is now pending before you a suit in which C. H. Bosworth, as receiver of the Chicago, Peoria & St. Louis Railway Company, and The Chicago, Peoria & St. Louis Railway Company are appellants and The Chicago, Milwaukee & St. Paul Railway Company is appellee, No. 442, which suit was removed into the said circuit court of appeals by virtue of an appeal from the circuit court of the United States for the southern district of Illinois, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said circuit court of appeals and removed into
399 the Supreme Court of the United States, do hereby command you that you send without delay to the said Supreme Court,

as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the tenth day of May, in the year of our Lord one thousand eight hundred and ninety-eight.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

400 UNITED STATES OF AMERICA, *Seventh Circuit,* } ss:

In obedience to the command of the foregoing writ of certiorari and in pursuance of the stipulation of the parties, a full and true copy of which is hereto attached, I do hereby certify and return that the transcript of the record filed with the application to the Supreme Court of the United States for a writ of certiorari in the case of C. H. Bosworth, receiver of the Chicago, Peoria & St. Louis Railway Company, and The Chicago, Peoria & St. Louis Railway Company, appellants, and The Chicago, Milwaukee and St. Paul Railway Company, appellee, is a full, true, and complete transcript of the record upon which said cause was heard in the United States circuit court of appeals for the seventh circuit, together with all proceedings in said court.

Seal United States Circuit Court of Appeals, Seventh Circuit.

In testimony whereof I hereunto subscribe my name and affix the seal of said United States circuit court of appeals for the seventh circuit, at the city of Chicago, this 18th day of May, A. D. 1898.

OLIVER T. MORTON,
Clerk United States Circuit Court of Appeals for the Seventh Circuit.

401 In the United States Circuit Court of Appeals for the Seventh Circuit, October Term, A. D. 1897.

MERCANTILE TRUST COMPANY
vs.
CHICAGO, PEORIA & ST. LOUIS RAILWAY COMPANY ET AL.

In the matter of the intervening petition of the Chicago, Milwaukee & St. Paul Railway Company.

C. H. BOSWORTH, Receiver, etc., Appellant,
vs.
THE CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, Appellee.

It is stipulated by and between the parties hereto, by their respective counsel, that the certified copy of the transcript of record filed by the clerk of this court in the Supreme Court of the United States in the application there made for a writ of certiorari in the

above-entitled cause, there entitled The Chicago, Milwaukee & St. Paul Railway Company *vs.* C. H. Bosworth, receiver, &c., No. 643, all to the October term, 1897, of said court, shall be taken as the return to said writ of certiorari granted by said Supreme Court in said cause on the 10th day of May, A. D. 1898.

Dated May 16, 1898.

GEO. R. PECK,
BURTON HANSON,
Solicitors for Chicago, Milwaukee & St. Paul Railway Company.
BLUFORD WILSON,
PHILIP BARTON WARREN,
Solicitors for C. H. Bosworth, Receiver.

(Endorsed:) United States circuit court of appeals, seventh circuit. Mercantile Trust Company *vs.* Chicago, Peoria & St. Louis Railway Company. In the matter of the intervening petition of Chicago, Milwaukee & St. Paul Railway Company. C. H. Bosworth, receiver, etc., *vs.* The Chicago, Milwaukee and St. Paul Railway Company, appellee. Stipulation. Filed May 18, 1898. Oliver T. Morton, clerk.

402 [Endorsed:] Case No. 16,856. Supreme Court of the United States. No. 283, October term, 1898. The Chicago, Milwaukee & St. Paul R'y Co. *vs.* C. H. Bosworth, rec'r, &c. Writ of certiorari and return. Filed May 18, 1898. Oliver T. Morton, clerk. Office Supreme Court U. S. Filed May 26, 1898. James H. McKenney, clerk.

403 In the Supreme Court of the United States, October Term, A. D. 1898.

MERCANTILE TRUST COMPANY
vs.
CHICAGO, PEORIA & ST. LOUIS RAILWAY COMPANY ET AL. } No. 283.

In the matter of the intervening petition of the Chicago, Milwaukee, & St. Paul Railway Company.

THE CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, Petitioner,
vs.
C. H. BOSWORTH, Receiver of the Chicago, Peoria & St. Louis Railway Company, Respondent.

Stipulation for Printing Portions of the Record.

Whereas certain portions of the transcript of record in the above-entitled cause and the cause entitled Jacob Rau, petitioner, *vs.* C. H. Bosworth, receiver of the Chicago, Peoria & St. Louis Railway Company, respondent, No. 285, October term, A. D. 1898, of this court, such as the amended intervening petition, the answer thereto, as well as the answer to the original intervening petitions, the entire

evidence taken, the opinion of the judges of the circuit court of appeals, as well as various other matters, rulings, proceedings, and doings, are in all respects identical:

Now, therefore, for the purpose of saving to the parties the expense of printing the entire transcript of record in the above-entitled cause, it is stipulated and agreed that the entire transcript of record in the aforesaid Rau case shall be printed, and that only the following portions of the transcript of record in the above-entitled cause shall be printed, to wit:

404 1. Intervening petition, found on page 23 and succeeding pages of the transcript of record, and proceedings in United States circuit court of appeals for the seventh circuit, filed in the above-entitled cause in this court, in the matter of the application for a writ of certiorari.

2. Report of master, found on pages 59 and 60 of said transcript of record.

3. Exhibit to said master's report, entitled T. McMichael & Son report, found on page 60 and succeeding pages of the transcript of record in the aforesaid Rau case.

4. Exceptions to master's report, found on page 61 and succeeding pages of said transcript of record.

5. Decree, found on pages 63 and 64 of said transcript of record.

7. Petition for appeal, found on page 347 of said transcript of record.

8. Assignment of errors by receiver, found on page 348 of said transcript of record.

8½. Appeal bond of said receiver, found on page 349 of said transcript of record.

9. Order allowing receiver's appeal, found on page 350 of transcript of record.

10. Petition of Chicago, Peoria & St. Louis Railway Company to be made a party and for leave to appeal, found on pages 350 and 351 of said transcript of record.

11. Assignment of errors by said railroad company, found on page 352 of said transcript of record.

12. Appeal bond of said railway company, found on page 353 of said transcript of record.

13. Order making said railway company party and granting appeal, found on page 354 of said transcript of record.

14. Decree of United States circuit court of appeals, found on page 395 of said transcript of record.

It is further stipulated and agreed that this cause shall be heard and considered by this court upon the transcript of record in
405 the aforesaid Rau case, No. 285, October term, 1898, of this court, in connection with such portions of the transcript of record in the above-entitled cause as shall be printed under this stipulation, and that the amended intervening petition, the answer thereto, as well as the answer to the original intervening petition, the entire evidence taken, the opinions of the judges of the circuit court of appeals, as well as various other matters, rulings, proceedings, and doings as contained and found in the transcript of record in the

aforesaid Rau case, shall for all purposes be treated and considered the same as if they had been printed and included within the printed transcript of record in the above-entitled cause.

Dated July 14th, 1898.

GEORGE R. PECK,
BURTON HANSON,
Counsel for Petitioner.
BLUFORD WILSON,
P. B. WARREN,
Counsel for Respondent.

406 [Endorsed:] Case No. 16,856. Supreme Court U. S., October term, 1898. Term No., 283. The Chicago, Milwaukee & St. Paul R'y Co., petitioner, *vs.* C. H. Bosworth, rec'r, &c., *et al.* Stipulation to omit parts of record in printing. Filed July 23, 1898.

Endorsed on cover: Case No. 16,856. U. S. C. C. of appeals, 7th circuit. Term No., 283. The Chicago, Milwaukee & St. Paul Railway Company, petitioner, *vs.* C. H. Bosworth, receiver of the Chicago, Peoria & St. Louis Railway Company, and The Chicago, Peoria & St. Louis Railway Co. Filed April 26, 1898.

11 Bd
P.D.C.
546

Supreme Court, U.S.
FILED.
APR 26 1898
JAMES H. McKENNEY
Clerk

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1897.

THE MERCANTILE TRUST COMPANY,
Complainant,
vs.
CHICAGO, PEORIA & ST. LOUIS RAILWAY COMPANY et al.,
Defendants.

In the matter of the Intervening Petitions of the Chicago, Milwaukee & St. Paul Railway Company, The Huntting Elevator Company and Jacob Rau.

Petition of the Chicago, Milwaukee & St. Paul Railway Company, The Huntting Elevator Company and Jacob Rau, for Writs of Certiorari, to the United States Circuit Court of Appeals for the Seventh Circuit

GEO. R. PECK,
BURTON HANSON,
COUNSEL FOR PETITIONERS.

The Gunthorp-Warren Printing Company, 53 Dearborn St., Chicago.

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1897.

CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, THE HUNTTING ELEVATOR COMPANY AND JACOB RAU,
Petitioners.

Petitions for Writs of Certiorari.

Petition for Writ of Certiorari requiring the United States Circuit Court of Appeals for the Seventh Circuit to certify to the Supreme Court for its review and determination the case of

C. H. BOSWORTH, RECEIVER, ET AL.,
Appellants,
vs.
CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY,
Appellee.

C. H. BOSWORTH, RECEIVER, ET AL.,
Appellants,
vs.
THE HUNTTING ELEVATOR COMPANY,
Appellee.

C. H. BOSWORTH, RECEIVER, ET AL.,
Appellants,
vs.
JACOB RAU,
Appellee.

---

which said appellees were intervenors in the suit of *Mercantile Trust Company* v. *The Chicago, Peoria and St. Louis Railway Company et al.*, which last mentioned

suit was brought in the Circuit Court of the United States for the Southern District of Illinois, to foreclose a certain mortgage or deed of trust given by said Chicago, Peoria and St. Louis Railway Company to said Mercantile Trust Company, in which suit said Bosworth was appointed Receiver of said Chicago, Peoria and St. Louis Railway.

TO THE HONORABLE SUPREME COURT OF THE UNITED STATES:

The Chicago, Milwaukee and St. Paul Railway Company, the Huntting Elevator Company and Jacob Rau separately petition and show to this honorable court as follows:

First. That these cases involved the same question and were heard as one case before the Master, the Circuit Court and the Circuit Court of Appeals, and have from their inception been treated by the parties and the courts in which they have been pending as one case, and your petitioners have therefore united in making this petition, but it is presented to this court as the separate petition of each of said petitioners.

The question involved in these cases is this: Sixty cars loaded with barley consigned from points in Iowa, Minnesota and Wisconsin to St. Louis, Missouri, were destroyed by fire, while in transit, at East St. Louis, Illinois. The petitioners claim that they were in the possession of the Receiver at the time of the fire, while the Receiver contends that he had delivered them to the next connecting carrier, the Terminal Railroad Association of St. Louis, and that they were in the possession of that Association at the time the loss occurred. The question therefore is, what constitutes a delivery of property in car-load lots from one carrier to another, while in

course of transportation? By reason of the rule adopted by the Federal courts in

Myrick v. *R. R. Co.*, 107 U. S., 102,
R. R. Co. v. *Jones*, 155 U. S., 334,

that the carrier in whose possession property that is in course of transportation over several connecting lines is, at the time of loss or damage, is alone liable, unless the initial carrier, by a special through contract of carriage that is certain and definite in its terms, assumes such liability, this question becomes one of great gravity and importance, for it affects the interests of all persons who are compelled to ship their products over several connecting lines of carriers to get them to market, and who may be unable to make a special contract with the initial carrier that it will assume liability for all loss and damage to the property transported, whether occurring on its or any one of the lines of the several connecting carriers.

And while this court, in *Pratt* v. *Railway Company*, 95 U. S., 43, had occasion to pass upon the question of the delivery of *package freight* as between connecting carriers, it has never considered the question, What constitutes a delivery of freight in *car-load lots* when in course of transportation over several connecting lines of carriers? And by recurring to the opinions filed in these cases by each one of the Circuit judges it will be seen that there exists differences of opinion among said judges concerning what constitutes a delivery of freight in car-load from one carrier to another, as well as concerning the rule announced in the Pratt case when applied to the question of delivery as it arises in these cases.

These cases were instituted by the filing of intervening petitions in the aforesaid suit of the *Mercantile Trust Company* v. the *Chicago, Peoria & St. Louis Railway Com-*

pany to foreclose a mortgage or trust deed given by the railway company in which said Bosworth was appointed Receiver. The grounds of the petitions were that the cars and the barley they contained at the time they were destroyed by fire were in the possession of the Receiver, and that he negligently allowed them to stand or to be stored on tracks near by a long wooden warehouse that was filled with loose hay, through and into which locomotive engines were continually passing and repassing, which warehouse taking fire, was itself consumed, along with said cars and their contents. The Receiver denied that the cars were in his possession, and alleged that before the fire occurred he had delivered them and their contents to the next connecting carrier, the Terminal Railroad Association of St. Louis, and that they were in the possession of that Association at the time of the fire and that that Association negligently placed them alongside said wooden warehouse, which he characterized in his answer as "a vertible fire-trap." The matters in controversy were referred to the Honorable Stuart Brown, of Springfield, Illinois, the Master in chancery of that court, to take the testimony and report thereon to the court. The report of the Master being in favor of the intervenors, exceptions were filed thereto by the Receiver. The report and exceptions came before the Circuit Court, the Honorable William J. Allen, District Judge, presiding, for hearing, whereupon the exceptions were overruled and decrees entered in favor of the intervenors for the amounts reported by the Master, as follows:

Chicago, Milwaukee and St. Paul Railway Company	$9,033.73
S. Y. Hyde Elevator Company	2,154.53
Huntting Elevator Company	2,600.95

Thomas McMichael & Son	3,169.25
W. W. Cargill Company	1,253.23
Jacob Rau	1,144.07
Henry Rippe	1,165.67
Gilchrist & Co	805.00

Appeals were taken from the decrees entered in the cases of the Chicago, Milwaukee and St. Paul Railway Company, the Huntting Elevator Company and Jacob Rau. No appeals were taken in the other cases for the reason that it was stipulated that the decrees in those cases should abide the result of the appeals in the three cases above named. The appeals came on for argument before the United States Circuit Court of Appeals on the 25th day of October, 1897, and were held under advisement until the 25th day of February, 1898, when each one of the Circuit judges comprising said court handed down a written opinion, Circuit Judges Woods and Showalter holding that the decrees should be reversed and the intervening petitions dismissed, each basing his opinion upon reasons that were entirely different from the other, while Circuit Judge Jenkins filed a dissenting opinion fully sustaining the report of the Master in chancery as well as the decree of the Circuit Court. It therefore appears that the Master in chancery, the District judge who presided at the Circuit, and one of the Circuit judges sitting in the Court of Appeals held that the cars and their contents at the time they were destroyed by fire had not been delivered to the Terminal Association but were in the possession of the Receiver, and that he was liable therefor, while the two remaining Circuit Judges held that the Receiver had made a delivery of said cars and their contents to the next succeeding carrier, the Terminal Railroad Association of St. Louis, but based their opinions and conclusions upon entirely different reasons.

Second. Your petitioners show that it appears by the record of said causes in said Circuit Court of Appeals, a certified copy of which is herewith filed in this court and presented as a part of this application, in accordance with the rule of this court, that this litigation arises upon the following state of facts:

That the Chicago, Milwaukee and St. Paul Railway Company is a corporation organized and existing under and by virtue of the laws of the State of Wisconsin, and is a citizen of that state, and as such was a common carrier of freight from points in Iowa, Minnesota and Wisconsin, to Rock Island, one of its terminii in the State of Illinois, and that it was the owner of fifty-four of the sixty cars in which the barley in question was transported, that thirty-eight of said fifty-four cars, together with their contents, were totally destroyed at East St. Louis while in the possession of said Receiver, and that the value thereof as stipulated by the parties was $9,033.73, the remaining sixteen cars, which were partially destroyed, were repaired by the Receiver and returned to said railway company; that the Huntting Elevator Company, a corporation organized and existing under and by virtue of the laws of the State of Iowa, and a citizen of that state, Jacob Rau, a citizen of the State of Minnesota, James N. Gilchist and Colen F. Bell, citizens of said State of Iowa, engaged in business as partners under the firm name of Gilchrist & Co., at McGregor, in said state, Thomas C. McMichael and William McMichael, citizens of said State of Iowa, and engaged in business as partners under the firm name of McMichael & Son, at McGregor, in said state, the S. Y. Hyde Elevator Company, a corporation organized and existing under the laws of the State of Wisconsin, and a citizen of said state, and the W. W.

Cargill Company, a corporation organized and existing under the laws of the State of Wisconsin, and a citizen of that state, were engaged in the business of buying barley and shipping the same from various points in the States of Iowa, Minnesota and Wisconsin to St. Louis, Missouri; that their shipments of barley originated at stations on the line of railroad of the Chicago, Milwaukee and St. Paul Railway Company, and usually in cars of that company, and by that company transported to Rock Island, Illinois, one of the terminii of its line of road, and at that place the same were delivered to the Rock Island and Peoria Railroad Company, a connecting carrier, and by said last named company transported to Peoria, in said State of Illinois, and there delivered to the Chicago, Peoria and St. Louis Railway Company, a connecting carrier, which company was being operated by said Bosworth, as Receiver, and will hereafter be called the Receiver's company, and by that company transported to East St. Louis, Illinois, there to be delivered by the Receiver's company upon receiving orders from the consignees of said barley, to the Terminal Railroad Association of St. Louis, or the Wiggins Ferry Company, or some other connecting carrier, thence to be taken to its destination at St. Louis and there delivered to the consignees. This was the usual route employed by these parties for the shipment of their barley to St. Louis.

The Receiver's company had no terminal facilities whatever at East St. Louis, which was the southern terminus of its line of road; it had neither yard room nor switching facilities. It therefore entered into a contract with the Terminal Railroad Association of St. Louis whereby is secured the necessary yard room for handling and storing its cars, and switch engines and crews for

switching its cars to and from its main track and the tracks which it had the use of under its contract with the Terminal Association, and for making and breaking up its trains and for doing the necessary work of handling and moving its cars, for which the Receiver's company paid the Terminal Association a stated amount per car for each car handled. (Rau Rec., 111, 112.)

That on the evening of the 28th day of October, 1894, sixty cars loaded with barley, while standing on the tracks which the Receiver's company had the use of under its contract with the Terminal Association, were either damaged or totally destroyed by fire, said fire originating in the wooden warehouse hereinbefore referred to and characterized by the Receiver's answer as a "veritable fire-trap." That all of these sixty cars were loaded with barley at various stations on the railroad of the Chicago, Milwaukee and St. Paul Railway Company in Wisconsin, Minnesota and Iowa, and were all consigned to certain consignees at St. Louis, Missouri; that in due course of transportation said cars were delivered to the Receiver's company at said Peoria, and by that company hauled from said Peoria to the end of its line at said East St. Louis. At that point its road engines were uncoupled from the trains which brought the cars to East St. Louis and taken to the round house of the Terminal Association, which stored them under the aforesaid agreement. Thereupon and in pursuance of the agreement between the Receiver's company and the Terminal Association, whereby the latter furnished yard room, tracks and switching service for the Receiver's company, a switch engine and crew of the Terminal Association switched the cars from the place where they were left standing on the main track of the Receiver's company to the tracks which that company

had the use of under its agreement with the Terminal Association. There they remained standing until they were destroyed by fire as aforesaid.

It further appears from the record in these cases that under the custom which existed at East St. Louis in reference to handling the barley business of the Receiver's company, after cars containing barley had been placed upon these tracks which the Receiver's company used its agent at East St. Louis would take the way-bills under which the cars had been delivered into the possession of the Receiver's company and hauled to East St. Louis, which way-bills contained on their face the consignor, consignee, number, destination and contents of the car, and notify "*the consignee that we* (the receiver) *had a car numbered "so and so, loaded with barley, where do you want it?*" (Rau Rec., 205.) In due time, this notice which the Receiver's agent had sent to the consignee the consignee would send back to the Receiver's agent endorsed on the back with directions where the car should be sent. *This was done under an arrangement between the consignees of this barley and the Receiver's company, that it would hold their barley at East St. Louis subject to their orders*—so the Receiver's agent testified:

Q. Was that a different and separate transaction having reference to the orginal contract between the shippers and the C., M. & St. P.; *was it a new arrangement the consignee directed and controlled*, or was it the original arrangement named by the shipper?

A. *A new arrangement by the consignee, who placed orders with us to hold this barley.* (Rau Rec., 205.)

Thereupon the Receiver's agent would make out a way-bill containing the name of the consignee, the destination, number and contents of the car, take it to the agent of the

Terminal Association, deliver it to him, and take his receipt. Until this way-bill was received, the Terminal Association of course had no knowledge concerning these cars further than it had switched them from the main line of the Receiver's company to the tracks which that company had the use of under the aforesaid agreement, and had earned in consequence a certain amount, depending upon the number of cars switched. It did not and could not know until this way-bill was received that the cars contained barley, nor what they contained, or that they were destined to St. Louis or to some other point, and if so, where or to whom, or by what route they were consigned.

Upon the receipt of this way-bill from the Receiver's company's agent, the agent of the Terminal Association would give directions to the switching crew and they would take the car out of the Receiver's portion of the yard and place it in the Terminal Association's portion of the yard and there take it to the connection or destination indicated on the way-bill. (Rau Rec., 82.) For this service the Receiver's company paid the Terminal Association a stated amount for each car so switched. It further appears that cotemporaneous with the delivery of the way-bill by the Receiver to the Terminal Association, and not before, if the car named in the way-bill was the car of some company other than the Receiver's company, the Receiver's agent at East St. Louis would notify the car accountant of his company that car numbered, for example, 2,500, belonging to the Chicago, Milwaukee and St. Paul Railway Company, had that day been delivered to the Terminal Association. Thereupon such car accountant would send a formal notice, called a junction car report, to the car accountant of the Chicago, Milwaukee

and St. Paul Railway Company, notifying him of the delivery of the car to the Terminal Association. Up to the time of receiving this junction report, the car was charged to the Receiver's company on the books of the Chicago, Milwaukee and St. Paul Railway Company.

It further appears from the record that the Receiver made no proof of having ever sent to the consignee the usual and customary notice of the arrival of any of the cars in controversy. It also appears, and the fact is not in dispute, that no way-bill had been delivered to the Terminal Association for any of the cars in controversy, and that no notice had been sent by the Receiver's agent to his car accountant, or by that car accountant to the car accountant of the Chicago, Milwaukee and St. Paul Railway Company, that any of the cars in controversy had been delivered to the Terminal Association.

It also appears that the cars in controversy at the time they were destroyed by fire were standing on the tracks which the Receiver's company commonly use under its agreement with the Terminal Association, granting it track and yard room and other terminal facilities at East St. Louis. This fact was stipulated. (Rau Rec., 115.)

It also appears that after the foregoing facts had been testified to, counsel for Receiver's company stated that he had not been able to obtain the testimony of the consignees as he had anticipated, and therefore asked for further time, stating that he expected to prove by them that the Terminal Association, as an inducement to them to ship their barley by that route, agreed to hold the cars on *its tracks* at East St. Louis, and offered them other facilities in *its yards* at that place. To avoid further delay counsel for appellees admitted that if the persons named were present they would testify substantially as

counsel stated he expected they would testify—assuming, of course, that this arrangement, if it existed, became operative only after the cars had been delivered into the possession of the Terminal Association so that they could be said to be on *its tracks* and in *its yards*, and that delivery could not be said to have been made until the agent of the Receiver's company had delivered to the agent of the Terminal Association the customary way-bill containing the names of the consignor and consignee, the route and destination, and the number and contents of the car, and taken the receipt therefor. For until this had been done the Receiver's company had not parted with either the possession or control of the cars, and the Terminal Association could not know which of the cars that were standing on the tracks which the Receiver's company used were routed over its tracks, and if so, what they contained, where they were destined or to whom consigned, and until this information was received it would not, as a matter of course, accept delivery. (Rau Rec., 82, 86, 87, 90, 95.) And such delivery not having been made of any of the cars in controversy, the arrangement which counsel stated he expected to prove had no application to this case.

Palmer v. *C., B. & Q. R. R. Co.*, 13 Atl. Rep., 818.

Mt. Vernon Co. v. *Ala. Gt. North. Ry. Co.*, 92 Ala., 296–298.

Texas & Pacific Ry. Co. v. *Clayton*, 51 U. S. App., 676.

Third. It was upon the foregoing facts that the court rendered its decision reversing the decrees of the court below. Presiding Judge Woods held that the decrees should be reversed on the ground that the arrangement

between the consignees and Terminal Association, which counsel for Receiver's company stated he expected to prove, became effective immediately upon the cars being placed on the tracks which the Receiver's company used under its agreement with the Terminal Association; that as soon as the cars were so placed on these tracks, that Association would be deemed to be holding them, notwithstanding there had been no delivery of them in the usual and customary way that deliveries were made at that place by the Receiver's company to the Terminal Association, and that this would be true although the Terminal Association had no knowledge of the destination, consignee or contents of the car. He cites as sustaining his position the case of *Pratt* v. *Ry. Co.*, 95 U. S. 43, and the case of *Mount Vernon Company* v. *Ala. Gt. North. Ry. Co.*, 92 Ala., 296.

Judge JENKINS writes a dissenting opinion, holding that the decrees should be affirmed. In commenting upon the opinion of the presiding judge he says:

"I am unable to concur in this conclusion. I have sought to show that there had been no delivery of these cars to the Terminal Association. It had not knowledge of their destination. It had not knowledge of the consignees of them. They were subject to the direction and control of the Receiver. The Terminal Association under its contract with the Receiver had placed these cars upon these tracks for the Receiver and for a compensation agreed upon. It therein was the agent of the Receiver. It could not know whether these cars were to be transported over its line or the lines of the Wiggins Ferry Company; it could not know in what direction they were to be transported, or their ultimate destination; when it had placed the cars on its track pursuant to its contract with the Receiver, it had nothing further to do with them until the Receiver had dispossessed himself of possession and control and had invested the Terminal Association therewith. I cannot comprehend that the general agree-

ment between the Terminal Association and consignees can become operative with respect to the contents of these cars until delivery to the Terminal Asaociation and it had been invested with the exclusive possession and the exclusive control of them. The force of the reasoning is not perceived whereby it is held that because in fact these goods were ultimately to go to persons who had contracted with the Terminal Association—of which contract Receiver had no knowledge—therefore these goods were held under that contract before delivery in fact to the Terminal Association and before it was invested with exclusive control of them. * * * The question here is whether the Receiver is absolved from liability ; whether failing a delivery of the cars to the Terminal Association, failing a surrender by the Receiver of control over them, with ignorance upon the part of the Terminal Association of their destination or their consignees, the agreement between the Terminal Association and the consignee had become operative with respect to these goods. I think not. If the Receiver had directed that the Terminal Association under its contract with him should transfer these goods to the Wiggins Ferry Company, his order must have received recognition and have been carried out by the Terminal Association, and it cannot be doubted that up to the time of the fire in question the goods were so subject to the Receiver's direction and control. For these reasons I think that the decrees appealed from should be affirmed."

He also cites *Pratt* v. *Ry. Co.*, *supra*, and *Mount Vernon Company* v. *Ala. Gt. North. Ry. Co.*, *supra*, to sustain his position.

Judge Showalter, in his opinion, holds that the moment the switch engine of the Terminal Association was coupled to the train of the Receiver's company, for the purpose of switching it from the main line of that company to the tracks which the Receiver's company used under its agreement with the Terminal Association, the Receiver's company's liability as a common carrier ceased and that of the Terminal Association began, and that the Receiver's

company was not again invested with any liability either as a common carrier or as a warehouseman in regard to cars so handled. He also cites the cases of *Pratt* v. *Ry. Co.*, and *Mount Vernon Company* v. *Ala. Gt. North. Ry. Co.*, to sustain his position.

These opinions are a part of the certified copy of the transcript of record herein.

Fourth. Your petitioners further show that they are informed and believe and do therefore respectfully represent and submit that there are good and sufficient reasons why the judgment of said Circuit Court of Appeals should not be allowed to stand as the final judgment in these cases, but that the record herein made should be reviewed and these cases finally determined by this Honorable Court; and they therefore present this, their separate petition, to that end, and in support thereof urge the following reasons:

1. That the opinions delivered by Judges Woods and Showalter, the two judges constituting a majority of said Circuit Court of Appeals, are not entitled to any strong presumption of correctness, for they are not only opposed to each other, but are opposed to those announced by Judges Jenkins and Allen and by Master in Chancery Brown.

2. That by reason of the difference of opinion among the judges of the Circuit Court of Appeals the questions of law involved in these cases are in a state of grave and serious uncertainty, and that the decision of the majority of the judges of said Circuit Court of Appeals is not consistent with the decisions of this Honorable Court, especially in the cases of *Pratt* v. *Railway Co.*, 95 U. S., 43, and *Covington Stockyard* case, 139 U. S., 128; nor with the decision of the Circuit Court of Appeals for the Second Circuit in *Texas and Pacific Railway Co.* v.

Clayton, 51 U. S. App., 676, S. C. 84 Fed. Rep., 305, nor with the decisions of the state courts:

Mt. Vernon Co., v. *Ala. Gt. Nor. Ry. Co.*, 92 Ala., 296, 298.

Palmer v. *C. B. & Q. R. R. Co.*, 13 Atl. Rep., 818.

3. That the questions involved in the correct decision of these cases are most important, as will appear by a reading of the opinions of the judges of said Circuit Court of Appeals. The amount involved in these cases is not only large, but there are numerous other claims pending against the Receiver growing out of the same fire, which the parties have agreed shall abide the final determination of these cases. But aside from any monetary consideration, the commercial considerations involved are all-important. In recent years there has come into existence at all large commercial centers in the west, like Chicago, St. Louis, Kansas City, St. Paul and Minneapolis, corporations that are organized for the double purpose of supplying terminal facilities to railroad companies which are unprovided with such facilities, and of transporting such freight as is received from their connections to the points and places of industry that are reached by their various tracks. The Terminal Railroad Association of St. Louis is such a corporation. It not only furnishes terminal facilities such as yard and track room for handling and storing cars and switch engines and crews to such railway companies as have need of such facilities at East St. Louis, but transports all freight which such companies deliver to it from East St. Louis to such places as its various tracks reach in East St. Louis and St. Louis. The Receiver's company had no terminal facilities whatever at East St. Louis, the southern terminus of its line of rail-

road. It contracted with that Association for the necessary yard room and track facilities and switch engine and crews for handling its cars, making and breaking up its trains and for storage room for a reasonable number of cars, not exceeding 150 at any one time. Under this contract so much of tracks numbered from forty to fifty in the yards of the Terminal Association as was necessary to give the Receiver's company room for 150 cars was set aside and used by that company in the transaction of its business. The cars of barley in controversy at the time they were destroyed by fire were standing on some one or more of these ten tracks, having been switched there from the main line of the Receiver's company by the switch engine and crew of the Terminal Association under its agreement to furnish that company with certain terminal facilities. No way-bill or other manifest, giving the name of the consignee, or route, or destination, or the number or contents of the car, had been tendered or delivered to the Terminal Association for any of the cars, although the invariable custom and practice at that place between the two companies was to tender such a way-bill whenever it was intended to make a delivery of a car of freight; and a delivery was never regarded as having been made until a way-bill had been tendered and accepted and the car named therein taken from the tracks which the Receiver's company used under its agreement with the Terminal Association, and switched to the tracks of that Association. Proceedings were taken against the Receiver's company to recover the value of the cars and their contents, the claim being that they were in the possession of that company when the loss occurred. After a litigation lasting three years, the claimants are advised by a divided court, Judge Jenkins dissenting, and Judges Woods and Showalter disagreeing with each other

quite as much as with Judge Jenkins, that the wrong carrier has been pursued, and that their remedy is against the Terminal Association. These cases, therefore, not only involve the question, what constitutes a delivery of freight in car-load lots, as between carriers in the ordinary course of business, but as between carriers sustaining to each other the relation which existed between the Receiver's company and the Terminal Association by virtue of the contract under which the former acquired from the latter the use of such terminal facilities as its needs at East St. Louis required. And when it is considered that arrangements such as existed between the Receiver's company and the Terminal Association at East St. Louis are in operation in nearly all the large commercial and railway centers of the United States, and that there are hourly vast quantities of freight of immense value in cars standing on tracks under circumstances and conditions that are substantially similar to those that are present in these cases, and the interest which the owners of such freight in the event of loss have in knowing in which carrier the possession is, the questions involved in these cases are too important to be left in the unsatisfactory and unsettled condition in which they are left by the opinions of the two judges constituting a majority of said Circuit Court of Appeals.

Wherefore, your petitioners respectfully and separately pray that writs of *certiorari* may be issued out of and under the seal of this Honorable Court, directed to the United States Circuit Court of Appeals for the Seventh Circuit, commanding said court to certify and send to this court on a day certain, to be therein designated, a full and complete transcript of the record, and all proceedings of said Circuit Court of Appeals in each of the said cases therein, entitled as follows:

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT—OCTOBER TERM, A. D. 1897.

MERCANTILE TRUST COMPANY
vs.
CHICAGO, PEORIA & ST. LOUIS RAILWAY COMPANY *et al.*

In the matter of the intervening petition of the Chicago, Milwaukee & St. Paul Railway Company.

C. H. Bosworth, Receiver, etc., *Appellant,*
vs.
The Chicago, Milwaukee & St. Paul Railway Company, *Appellee.*
No. 442.

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT—OCTOBER TERM, A. D. 1897.

MERCANTILE TRUST COMPANY
vs.
CHICAGO, PEORIA & ST. LOUIS RAILWAY COMPANY *et al.*

In the matter of the intervening petition of Jacob Rau.

C. H. Bosworth, Receiver, etc., *Appellant,*
vs.
Jacob Rau, *Appellee.*
No. 452.

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT—OCTOBER TERM, A. D. 1897.

MERCANTILE TRUST COMPANY
vs.
CHICAGO, PEORIA & ST. LOUIS RAILWAY COMPANY *et al.*

In the matter of the intervening petition of the Huntting Elevator Company.

C. H. Bosworth, Receiver, etc., *Appellant,*
vs.
The Huntting Elevator Company, *Appellee.*
No. 453.

to the end that each of said cases may be reviewed and determined by this court as provided in section 6 of the act of Congress entitled "An act to establish Circuit Courts of Appeal and to regulate in certain cases the jurisdiction of the Courts of the United States, and for other purposes," approved March 3, 1891; and that each of your petitioners may have such other or further relief or remedy in the premises as to this court may seem appropriate and in conformity with the said act, and that the said decision of the said Circuit Court of Appeals in each of said cases may be reversed by this honorable court, and your petitioners will ever pray.

CHICAGO, MILWAUKEE AND ST. PAUL RAILWAY COMPANY,
THE HUNTINGTON ELEVATOR COMPANY, and
JACOB RAU,
Petitioners,

By Geo. R. Peck, Burton Hanson,
Their Attorneys.

STATE OF ILLINOIS, }
COUNTY OF COOK. } ss.

Burton Hanson, being duly sworn, says that he is one of the attorneys for the Chicago, Milwaukee and St. Paul Railway Company, the Huntting Elevator Company and Jacob Rau, the petitioners above named, and as such attorney he has had personal charge for said petitioners of the cases in the foregoing petition mentioned, in the Circuit Court of the United States for the Southern District of Illinois and in the United States Circuit Court of Appeals for the Seventh Circuit; that he has read the foregoing petition, and that the facts therein stated are true, to the best of his knowledge, information and belief.

Burton Hanson

Subscribed and sworn to before me this 16th day of April, A. D. 1898.

Seal.

W. D. Millard

Notary Public, Cook County, Ill.

IN THE SUPREME COURT OF THE UNITED STATES—
OCTOBER TERM, 1897.

To Honorable Bluford Wilson and Philip Barton Warren, Attorneys for C. H. Bosworth, Receiver, named in the annexed and foregoing petition:

In the cases mentioned in the annexed and foregoing petition, you will please take notice that on Monday, the

2nd day of May, 1898, at the opening of court, or as soon thereafter as counsel can be heard, the petition of which the foregoing is a copy will be submitted to the Supreme Court of the United States for a decision of the said court thereon.

Yours, &c.,

Geo. K. Peck

Burton Hanson.

Attorneys for Chicago, Milwaukee and St. Paul Railway Company, The Huntting Elevator Company, and Jacob Rau, Petitioners.

Service of a copy of the foregoing notice and of the petition for *certiorari* annexed thereto is hereby admitted this ..... day of ....., 1898.

.....

.....

Attorneys for C. H. Bosworth, Receiver, &c.

No 643 293.
Brf. of Peck & Hanson for Pet
Filed April 26, 1898.
FILED
APR 26 1898
JAMES H. McKENNEY

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1897.

THE MERCANTILE TRUST COMPANY,
Complainant,
vs.
CHICAGO, PEORIA & ST. LOUIS RAILWAY COMPANY et al.,
Defendants.

643

In the matter of the Intervening Petitions of the Chicago, Milwaukee & St. Paul Railway Company, The Huntting Elevator Company and Jacob Rau.

Brief in Support of the Separate Petitions of the Chicago, Milwaukee & St. Paul Railway Company, The Huntting Elevator Company and Jacob Rau, for Writs of Certiorari, to the United States Circuit Court of Appeals for the Seventh Circuit.

GEO. R. PECK,
BURTON HANSON,
COUNSEL FOR PETITIONERS.

The Gunthorp-Warren Printing Company, 53 Dearborn St., Chicago.

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1897.

THE MERCANTILE TRUST COMPANY,
Complainant,
vs.
CHICAGO, PEORIA & ST. LOUIS RAILWAY COMPANY ET AL.,
Defendants.

In the matter of the Intervening Petitions of the Chicago, Milwaukee & St. Paul Railway Company, The Huntting Elevator Company and Jacob Rau.

Brief in Support of the separate Petitions of the Chicago, Milwaukee & St. Paul Railway Company, The Huntting Elevator Company and Jacob Rau, for Writs of Certiorari, requiring the United States Circuit Court of Appeals for the Seventh Circuit to certify to the Supreme Court for its review and determination the cases of

C. H. BOSWORTH, RECEIVER, ET AL.,
Appellants,
vs.
CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY,
Appellee.

C. H. BOSWORTH, RECEIVER, ET AL.,
Appellants,
vs.
THE HUNTTING ELEVATOR COMPANY,
Appellee.

C. H. BOSWORTH, RECEIVER, ET AL.,
Appellants,
vs.
JACOB RAU,
Appellee.

STATEMENT OF FACTS.

The case presented by the record and the petition for writs of certiorari is this: One Bosworth, as Receiver,

operated the Chicago, Peoria and St. Louis Railway Company, which had a line of railroad from Peoria to East St. Louis, both in the State of Illinois. Having no terminal facilities whatever of his own at the latter place, the Receiver entered into a contract with the Terminal Railroad Association of St. Louis, whereby that Association undertook and agreed to furnish him necessary yard room, track facilities, switch engines and crews for handling his business, making and breaking up his trains that arrived at and departed from that place, *and storage room for a reasonable number of cars, not exceeding 150 at any one time.* Under this agreement, so much of tracks numbered from 40 to 50 as was necessary to give the Receiver storage room for that number of cars was, quoting from the second subdivision of the contract, "set aside for the use of the party of the second part," the Receiver. (Rau Rec., 111.) And these were the tracks that were commonly and usually used by the Receiver for handling and storing his cars and upon which they were placed upon their arrival at East St. Louis, and where they remained standing until they were delivered to the Terminal Association, or other disposition had been made of them. (Rau Rec., 76, 78, 81, 82, 95, 101, 181, 202, 229, 232; and Stipulation 2d Subdiv. Rau Rec., 115.) The practice under this agreement was that upon the arrival at East St. Louis of the Receiver's trains, they would come to a stop at the end of his track and there they would stand until a switch engine of the Terminal Association would hitch to them and switch them to some one or more of the ten tracks which the Receiver had the use of under his agreement with that association. After having been switched to these tracks, the cars would remain there until the Receiver gave directions to

the Terminal Association for their further shipment or transportation. If they were destined to St. Louis or to points beyond by way of the Terminal Association, the Receiver would make out a manifest, called a way-bill, which contained on its face the name of the consignor and consignee, the route and destination and number, name and contents of the cars, and deliver that to the agent of the Terminal Association and take his receipt therefor. Thereupon the switching crew of the Terminal Association would take the way-bill, take the cars named therein out of the Receiver's portion of the yard and place them in its portion of the yard, put them into a train and take them to the connection or destination indicated by the way-bill. If the cars were routed by some other line than that of the Terminal Association, such as the Wiggins Ferry, a competing line, they would be switched by the Terminal Association from the tracks which the Receiver used under his agreement with that Association, to the tracks of the ferry company. This service was performed under the agreement with the Terminal Association. (See 4th subdivision thereof, Rau Rec., 11.) The manner in which the Receiver's cars were handled after their arrival at East St. Louis is probably best told by the witnesses themselves. They are George H. Felps, agent of the Terminal Association, W. H. Calvert, agent of the Receiver, E. R. Stapleton, his chief clerk, and the Re ceiver himself.

Geo. H. Felps testified as follows:

Q. What company breaks up this train and places the cars on the tracks marked red?

A. The Terminal Railroad Association.

Q. That done under the agreement introduced here?

A. Yes sir; at a certain sum per car.

Q. What sum?

A. Fifty cents a car.

Q. When that train is broken up, as you have stated, and the cars set on the tracks marked red, what is then done with these cars?

A. We are done with the cars then until we get way-bills from the agent of the C. P. & St. L.

Q. From the receiver?

A. Yes, sir; from the agent of the receiver.

Q. What is a way-bill?

A. A manifest showing what disposition is to be made of the freight.

Q. When you receive the way-bill of a car what do you do then?

A. Card that car out, and our yardmen are instructed to switch it out and deliver it according to the instructions.

Q. Does the way-bill contain the number of the car and destination?

A. Yes, sir; consignee, destination and route.

Q. *When you receive this way-bill and switch the car out, where do you take it?*

A. *Take the car out of their yard, their portion of the yard, and place it in the train in our portion of the yard, and take it to the connection or destination indicated.* (Rau Rec., 82.)

And further at page 86 he testified:

Q. What was the custom in respect to handling these cars set out on these tracks, after they had been set there on the part of the Terminal Association?

A. *We had nothing to do with them at all until we received way-bills, if they stood there till doomsday.*

E. R. Stapleton, witness for Receiver, testified as follows:

Direct Examination.

Q. A train comes in on this "Y," what is then done with it by the receiver, if anything?

A. The trains stops on the "Y" and the receiver is done with them.

Q. Is that true?

A. Yes, sir; the receiver does not handle the cars or control their handling in a *direct* way after that. (Rau Rec., 199.)

Cross-Examination.

Q. The major asked if the receiver was done with them, so far as handling the cars?

A. So far as the handling of the cars.

Q. *The receiver did have something else to do with them with reference to sending them on to St. Louis in the way of giving way-bills?*

A. *Yes, sir; giving way-bills.*

Q. When those way-bills are made out by the agent at East St. Louis they are delivered to the Terminal Association?

A. And their receipt taken.

Q. Of the way-bill?

A. Yes, sir.

Q. So you would have the receipt of every way-bill delivered?

A. Yes, sir.

Q. Then the Terminal Association would take these cars according to the direction on the way-bill?

A. Yes, sir. (Rau Rec., 203, 204.)

W. H. Calvert, a witness for Receiver, testified as follows:

Q. When way-bills were made out by the receiver at East St. Louis for barley consigned to St. Louis and other points to which the Terminal Association was to take it, where were the way-bills made out—at your office?

A. Yes, sir.

Q. That would be way-bills of all cars going to some other points than East St. Louis?

A. Yes, sir; except such as were to go to Wiggins Ferry, in which case the way-bills would be delivered to the Wiggins Ferry.

Q. None of the cars in controversy here—barley—went by the way of Wiggins Ferry?

A. No, sir. (Rau Rec., 255.)

C. H. Bosworth, the receiver, testified as follows:

Q. Isn't it a universal custom whenever there is a car delivered from one company to another, consigned to a point beyond, before that car is taken by the company to which it is delivered and moved on to its destination a way-bill accompanies that car and is delivered to the receiving company?

A. I can't say it is a universal custom.

Q. How would the receiving company know what to do with a car without a way-bill?

A. Might take the directions of the agent; *I will state it is undoubtedly generally the case.* (Rau Rec., 247.)

And on page 248 the Receiver testified that until the Terminal Association received a way-bill it would not undertake to move a car, and that until a way-bill was delivered or instructions given to the agent of the Terminal Association the car was subject to his, the Receiver's orders.

The cars of barley in controversy came into the possession of the Receiver at Peoria from a connecting line of road. Their destination was St. Louis, Missouri. They were hauled by the Receiver to the end of his main track at East St. Louis. Upon their arrival there they were switched from such main track by a switch engine of the Terminal Association and placed upon some one or more of the ten tracks which the Receiver had the use of in the yards of that Association under the aforesaid agreement. There they remained standing until they were destroyed by fire, which occurred on the evening of the 28th day of October, 1894. *No way-bill had been delivered by the Receiver to the Terminal Association for any of the cars in controversy.* The petitioners base their right to recover on the ground that the cars and the barley they contained at the time they were destroyed by fire were in the possession of the Receiver and that he negligently

allowed them to stand or to be stored on tracks near by a long wooden warehouse that was filled with loose hay, through and into which locomotivs engines were continually passing and repassing, which warehouse taking fire was itself consumed along with said cars and their contents. The Receiver denies that the cars were in his possession at the time they were destroyed by fire, and alleges that before the fire occurred he had delivered them and their contents to the next connecting carrier, the Terminal Association, and that they were in the possession of that Association at the time of the fire, and that that Association negligently placed them alongside said wooden warehouse, which he characterizes as "a veritable fire-trap." The pleadings, therefore, raise a single issue: Were the cars and their contents at the time they were destroyed in the possession of the Receiver, or had they been delivered by him to the next succeeding carrier, the Terminal Association? The Master to whom the cases were referred, District Judge Allen, who presided at the Circuit, and Circuit Judge Jenkins, held that there had been no delivery of the cars by the Receiver to the Terminal Association and that he was liable for the value of the cars and their contents, while Circuit Judges Woods and Showalter held that there had been a delivery of the cars by the Receiver to the Terminal Association, but each disagreed with the other as to the reasons therefor.

ARGUMENT.

I.

Circuit Judge Showalter, in his opinion, holds that the act of the Terminal Association, in switching the cars from the Receiver's main track to the tracks which he used under his agreement with that Association, constituted a delivery of the cars by the Receiver to the Terminal Association, and that a delivery of the customary way-bill was not necessary to a delivery of the cars. This holding, we submit, is not only utterly opposed to the custom under which deliveries of cars were made by the Receiver to the Terminal Association at East St. Louis, as disclosed by the undisputed testimony, but is in conflict with the decisions of this and other courts.

There is no dispute in the testimony as to the custom under which deliveries of cars were made at East St. Louis by the Receiver to the Terminal Association. This custom was that a car was never treated as delivered until a way-bill therefor was passed to the Terminal Association. It is apparent to anyone who is at all familiar with the transportation business of the country that this must, in the very nature of things, be the custom and practice, for it can readily be seen what confusion and delay would arise in the interchange of traffic in car-loads between the various railway companies if each company should, upon the arrival of cars at the terminus of its line of road, or at such other place where delivery is made to the next succeeding carrier, claim that it had made a delivery by merely placing or causing cars to be placed upon certain tracks without notifying such succeeding carrier, either

by way-bill or otherwise, of the delivery, or giving any instructions or directions for their further transportation. It is clearly apparent that without such a way-bill, or something that is its equivalent, the succeeding carrier would not know what disposition to make of the car. It would not know its contents, its route or destination or the party to whom it should be delivered, neither would it have any data upon which it could make a charge for transporting it. All this information is withheld by the preceding carrier, in this case the Receiver, until the customary way-bill is delivered, and so long as it is withheld from the succeeding carrier, there cannot, in the very nature of the transaction, be a delivery of the property to which such information applies. It is to the interest of both shippers and carriers, as well as to the general commerce of the country, that there should exist no doubt as to what constitutes a delivery of property in course of transportation, as between connecting carriers.

That cars were never treated as delivered to the Terminal Association until the Receiver had delivered way-bills therefor, is clearly shown by another circumstance which the undisputed testimony discloses, which is that whenever the Receiver delivered cars to that Association, if such cars belonged to some other company, his car accountant immediately on the very day of the delivery of way bills therefor, and not until then, reported to the company owning the cars the fact that certain of its cars, giving their numbers, had on that day been delivered by the receiver to the Terminal Association. This was the practice at East St. Louis as well as at all junction points. (Rau Rec. 88, 89, 90, 98, 106, 153, 154, 155, 247.) These reports are called junction reports, and by means of them each railway company is advised of the where-

abouts of its cars when they are out of its possession. Mr. Beecham, car accountant of the Chicago, Milwaukee and St. Paul Railway Company, and Mr. Bradley, the Receiver's car accountant, both testified that the Receiver had not reported any of the cars in controversy as having been delivered to the Terminal Association. (Rau Rec., 99, 106, 154, 155. This was because no way-bill had been delivered by the Receiver to the Terminal Association of any of the cars of barley in controversy. And in this connection, the attention of the court is called to the significant fact that prior to and up to the time of the fire, whenever the Receiver delivered a way-bill to the Terminal Association, at the same time such way-bill was delivered, he caused to be sent by his car accountant to the car accountant of the company whose cars were delivered, by such way-bill, a report called a junction report, advising that company of the delivery of the car named in such way-bill to the Terminal Association, and not until a way-bill had been delivered for such car was that car reported delivered to that Association. So that a junction report and a way-bill went hand in hand with every car that was delivered by the Receiver to the Terminal Association. For example: Mr. Felps, the agent of the Terminal Association, testified (Rau Rec., 86, 87) that on the 28th day of October, the day of the fire, the Receiver delivered three cars of the Chicago, Milwaukee and St. Paul Railway Company, Nos. 2,100, 31,872 and 16,562, to the Terminal Association by delivering way-bills therefor. By referring to the testimony of Mr. Beecham (Rau Rec., 100, 101, and Exhibit "E," Rau Rec., 128, 129), it will be seen that on the very day the way-bills for these three cars were delivered to the Terminal Association, the Re-

ceiver's car accountant reported these three cars as having been delivered on that day to the Terminal Association.

Now what does Mr. Felps say he did immediately upon the receipt of the way-bills for these three cars?

Q. What did you do after receiving these way-bills with respect to those cars?

A. Cars carded out as usual to their proper connections or destinations.

Q. Following the directions of the way-bills?

A. Yes, sir; in accordance with the instructions.

Q. Was the service rendered by the Terminal Association, in breaking up of the train of the receiver when it came in on the "Y," and placing the cars on these tracks marked red, a separate and distinct service from the work you did after receiving the way-bills?

A. It was a separate and distinct service.

Q. Explain how and why?

A. We received for this service, taking care of the cars for which we had way-bills, a separate revenue.

Q. Separate from what?

A. From making and breaking up trains. (Rec., 87.)

By an examination of the testimony it will be seen that in every instance the Receiver did not report a car as having been delivered to the Terminal Association until he had delivered a way-bill therefor to that Association.

This custom is in accord with the views of text writers and the decisions of the courts. Ray, on Freight Carriers, 388, says:

"The placing of a car by an initial carrier on the side track of a connecting carrier, without giving the latter any notice and without marking it with the name and address of the consignee, *or sending any way-bill or shipping directions*, does not establish the relation of common carrier between the initial and the connecting carrier.

The following cases hold the same rule:

Tex. & Pac. Ry. Co. v. *Clayton*, U. S. C. C. A., 2nd Cir., 51 U. S. App., 676; s. c. 84 Fed. Rep., 305.

Mt. Vernon Car Co. v. *Ala. G. S. Ry. Co.*, 92 Ala., 296.

Ins. Co. v. *Ry. Co.*, 55 Tenn. Repts., 268.

Palmer v. *Pa. Co.*, Conn. Sup. Ct., 13 Atl. Rep., 818.

In *Mt. Vernon Car Co.* v. *Ala. G. S. Ry. Co.*, *supra*, the court say:

"The same rule is applicable in the case of connecting carriers; the responsibility peculiar to the common carrier is not devolved on the next connecting carrier until the receiving carrier has delivered the goods to the former with directions for their shipment, the place of destination and to whom consigned. *Until this is done the relation of common carrier is not established between the shipper and the connecting carrier.*"

In *Texas & Pacific Ry. Co.* v. *Clayton*, *supra*, the question of delivery between connecting carriers was discussed by Circuit Judge WALLACE. He says:

"It may be safely affirmed, as a proposition applicable to all cases, that a deposit of the goods with notice, express or implied, at any place where the second carrier has control of them, conformable with usage created by the course of business between the two carriers, is a sufficient delivery, and discharges the first carrier. The liability of the second carrier begins when that of the first ends. * * * In the present case the cotton had never been placed within the control of the steamship line of the defendant. * * * Before the steamship line could have identified it for the purpose of removal, and after that, before they could have exercised any control over it, the co-operation and assistance of the defendant were necessary."

So here the Receiver up to the time the cars of barley were destroyed had full control over their further movement. For without the information which would be conveyed by the delivery of the customary way-bill, the Terminal Association could not identify them for further transportation, neither could it transport them, as it had no knowledge concerning their contents, their route, destination or consignee. This information was all with the Receiver, and until he imparted it to the Terminal Association by the delivery of the customary way-bill, that Association could exercise no control over the cars in the way of their further transportation.

These decisions are all in harmony with the rule of this court announced in *Pratt* v. *Grand Trunk Ry. Co.*, 95 U. S., 43, cited by Circuit Judge Jenkins in his dissenting opinion. In this case the freight in controversy was *package* freight. Something more is required in making a delivery of a car loaded with merchandise from one carrier to another, than is required in making a delivery of package freight. The package is addressed and the receiving company can readily ascertain from the package itself the consignee and destination, but a freight car has no marks nor address upon it showing the consignee, route or destination. This information is only found in the way-bill, and until that is delivered there can not in the very nature of things be a delivery of the car.

The Terminal Association in switching the Receiver's cars from his main track and placing them upon the tracks which he had the use of under his agreement, did not thereby take possession of such cars or accept delivery of them as a carrier. Whatever possession it thereby had of the cars was under its agreement to furnish the Receiver the use of certain tracks in its yards for *his* cars,

and to switch *his* cars from his main line to certain other of *his* tracks. As between the petitioners and the Receiver, these tracks were his tracks and the switch engines his engines, as much so as if he had owned them outright. And the cars and the freight they contain while on these tracks were the Receiver's so far as handling and caring for them. The preamble of the agreement makes this plain:

"That, whereas, the party of the first part undertakes to give to the party of the second part (the receiver) terminal facilities at East St. Louis for the handling of *its* (his) trains, care of *its* (his) engines and cars, and the handling and care of *its* (his) freight, under the following terms and conditions: "

While this agreement did not exclude the relation of connecting carriers as between the Receiver and the Terminal Association, neither did it change their relation. The same acts were required of the Receiver in making a delivery of cars to the Terminal Association as would have been required had there been no contract relations between the two and the Receiver had owned the necessary terminal facilities at East St. Louis. In treating the question as to what constitutes a delivery as between the Receiver and the Terminal Association, the agreement by which the Receiver acquired the use of certain terminal facilities at that point should be wholly eliminated and the case treated precisely as it would be treated if the Receiver owned the terminal facilities which he used under his agreement with that Association. Carriers cannot shift responsibilities by contracting with others to perform the duty incumbent upon them. (*R. R. Co.* v. *Reich*, 32 S. W. Rep., 818.) It must, therefore, be regarded as a fact that the terminals which the Receiver used at East St. Louis were for all purposes, as

between him and the petitioners, his terminals, and that the tracks, engines and the men employed about them in the handling of cars brought there by his trains were all his. So that when his trains arrived at East St. Louis, were broken up, and the cars placed on certain tracks which he had the use of, under his agreement as between him and the petitioners, the engines and the cars doing this work were his, and the tracks upon which the cars were left standing until they were way-billed out were likewise his tracks. The case, therefore, stands as if the Receiver had, in fact, owned the terminals which he, in fact, used, and the trains had been broken up by his own switch engine and switching crew and the cars placed upon his own tracks. Had the Receiver owned the facilities which he had the use of and, in fact, did use under his agreement with the Terminal Association, no one would for a moment contend that the breaking up of his trains and placing the cars upon the tracks where they stood at the time of the fire constituted a delivery of them to the Terminal Association. And yet there is as much warrant for such a contention as there is to justify the claim which is now put forth, that he had delivered these cars and their contents to that Association by simply having them switched from his main track to other of his tracks which he used in handling his business at East St. Louis. Up to the time that the Terminal Association took possession of cars under way-bills which had been delivered to it, it did nothing with them that the Receiver would not have done had these terminal facilities been his own. The Terminal Association therefore acted merely as the servant or agent of the Receiver in breaking up his trains and placing his cars on certain tracks, for which it received from the Receiver fifty cents a car. *One rail-*

way company does not pay to another railway company fifty cents a car for the privilege of delivering cars to it. And the fact that the Receiver under his agreement paid the Terminal Association fifty cents a car for breaking up his trains and placing them on these tracks, shows conclusively that in doing this work it was not expected nor intended by either of the parties that a delivery was thereby made of the cars so handled to the Terminal Association.

It was stipulated between the parties that the cars of barley in controversy at the time they were destroyed by fire were standing on the tracks that were commonly used by the Receiver under his agreement with the Terminal Association. (Rau Rec., 115.) This fact in connection with the undisputed testimony in the case, that no way-bill had been delivered for any of the cars to the Terminal Association, and that the Receiver had not reported the delivery of any of the cars to the Chicago, Milwaueee and St. Paul Railway Company, the company owning them, proves conclusively that the cars at the time of the fire had not yet been delivered to the Terminal Association and fully sustains the position of Circuit Judge Jenkins in his dissenting opinion.

II.

Circuit Judge Wood bases his conclusion that there had been a delivery of the cars and their contents to the Terminal Association wholly upon the statement of counsel for the Receiver made at the conclusion of the hearing before the master (Rau Rec., 260), that he expected certain of the consignees to have been present and expected to prove by them that the Terminal Association

had an arrangement with them by which it agreed to hold cars of barley on "*their tracks*" (meaning the tracks of the Terminal Association) at East St. Louis, and give them other facilities in "*their yards*" at that place, and the consent of counsel for petitioners that the witnesses, if present, would testify substantially as counsel expected they would testify.

We feel that a wrong construction has not only been given to this statement, but an importance attached to it which is not warranted by facts which are indisputably proven, and which we believe should be all-controlling in this case.

In considering the question of the delivery of freight as between connecting carriers when the same is in course of transportation, the rule that when possession is once proven to be in certain one of several carriers, the presumption is that such possession continues in that carrier until it is proven to be elsewhere, and that the burden is upon that carrier to show delivery, should not be lost sight of. And this burden is not met by offering proof that is conflicting or uncertain in its character or meaning, or proof that is susceptible of different constructions, theories and inferences. *The proof must be certain and convincing, and, taken as a whole, consistent with no other theory than that of delivery. This is the rule.* And it should be adhered to strictly in view of the other rule of the federal courts, which is not the rule in most of the state courts, that the carrier in whose possession property is at the time of loss is alone responsible, and not the initial carrier, unless it is shown by clear and satisfactory proof that such carrier contracted for liability beyond its line; and such liability is never inferred from proof that is uncertain or doubtful.

Myrick v. *R. R. Co.*, 107 U. S., 102.

The difficulties which beset shippers over several connecting lines of carriers, in case their property is lost, unless the rule that the carrier in whose possession the property is once shown to be shall show delivery by proof that is certain, clear and satisfactory, is strictly enforced, is well illustrated in the case at bar. After a litigation lasting three years, the claimants are now advised by a divided court, each judge differing with the other, that they have been pursuing the wrong carrier. They have no contract with the initial carrier for a through liability; they made the best investigation they could, and after tracing the property into the possession of the Receiver, and being informed that the Receiver's agent at East St. Louis, under the direction of the Receiver, in making proofs of loss to the insurance companies concerning the destruction of the property involved in this litigation, stated under oath that the cars in question were standing on tracks that were used by the Receiver (Rau Rec., 176); that no way-bill had ever been delierved by the Receiver to that Association of any of the cars, although it was an invariable custom to do so whenever a delivery was made; that the notices and directions in reference to the handling of the barley after it had reached East St. Louis, and while it was standing on these tracks, all passed between the consignees and the Receiver, they naturally concluded that the Receiver had the possession of their barley at the time it was lost, and accordingly intervened, as they were solicited by the Receiver to do, in the foreclosure suit.

Returning to the proposition that possession of this property having been proven to be in the Receiver, the burden was upon him to show by proof that was clear and satisfactory that he had delivered it to the Terminal

Association, let us briefly recur to what the testimony indisputably shows;

1. The Receiver had no terminal facilities at East St. Louis. He therefore contracted with the Terminal Association for the necessary yard room and track facilities and switch engines and crews for the handling of his cars, making and breaking up his trains that arrived at and departed from that place, *and for storage room for a reasonable number of cars not exceeding one hundred and fifty at any one time.* Under this agreement so much of tracks numbered from forty to fifty as was necessary to give the Receiver storage room for 150 cars was, quoting from the second subdivision of the contract, "set aside for the use of the party of the second part"—the Receiver. And these were the tracks that were commonly and usually used by the Receiver for handling and storing his cars, and upon which they stood until they were delivered to the Terminal Association by the switch engine of that Association taking them off these tracks and placing them in its portion of the yard. (Testimony of Roeder, Rau Rec., 76, 78; Felps, 81, 82, 95, 101; Lester, 188; Stapleton, 202; Calvert, 229, 232.) To identify these tracks they were marked red on a plat introduced in evidence. All the cars in controversy were at the time of the fire standing on some one or more of these tracks. (Rau Rec., 83, 84, 85.) *And it was stipulated by a written stipulation, signed by Receiver's counsel, that the cars in controversy at the time they were destroyed by fire were standing on the tracks that were commonly used by the Receiver under his agreement with the Terminal Association.* (Rau Rec., 115.) They were, therefore, in the Receiver's possession. The stipulation concedes this. They were placed there and were standing there in pur-

suance of the aforesaid agreement between the Receiver and the Terminal Association. The Receiver had the same right to have them switched there and stored there as though the tracks were his and the engine which placed them there was his, for he contracted and paid for this right, and so long as he occupied no more than the allotted room—150 cars—he could have stored these cars there until the right to do so ceased with the expiration of the contract. At the time of the fire there were, all told, but seventy of the Receiver's cars on these tracks. (Rau Rec., 177, 180.) So that the Receiver had room to spare. Now, how can it be reasonably urged that these cars were not as much in the physical possession of the Receiver as they would have been had he owned the tracks outright on which they stood and the engine which switched them there?

If they were, then it necessarily follows that the Terminal Association was not holding them at the time of the fire, and therefore the arrangement which counsel proposed to prove by certain absent witnesses, that it had agreed with the consignees to hold their cars on its ("*their*) tracks" and give them other facilities in its ("*their*) yards" had not yet become effective, for the cars were not in "*their yards*" or on "*their tracks*," but were on the tracks of the Receiver.

Let us recur to the statement which counsel made: It was that he *expected* to prove by certain witnesses that the Terminal Association had agreed to hold cars on "*their tracks*" at East St. Louis and offered other facilities in and about "*their yards*" at that place. Appellees' counsel admitted that if the witnesses were present they would testify substantially as counsel stated he *expected* they would testify. (Rau Rec., 261–262.) We at

that time had no thought, and not until it was argued in opposing counsel's brief on these appeals did it ever occur to us, that it could or would be contended that this informal stipulation, made in the hurry of and for the purpose of expediting a hearing, would or could be construed in such a manner as to cover cars *while they were yet standing and being held on tracks used by the Receiver, under his agreement with that Association*, and when they had not been way-billed to that Association. Especially when the Receiver's agent had, before this statement of counsel had been made, testified positively, and at the instance of counsel for Receiver, that these cars were held by the Receiver on these tracks on orders placed with him by the consignees to hold their barley. We supposed, and we submit any counsel would reasonably have supposed under like circumstances, that this statement of counsel related only to cars after they had been delivered by the Receiver to the Terminal Association in the usual and customary way in which deliveries were made at that place, so that it could be said that the cars were standing on "*their tracks*" in "*their yards.*" We did not suppose that it would or could be construed to apply to cars while they were standing on tracks which the Receiver was using under his agreement with that Association, made for no other purpose than to give him track and yard room for handling and storing *his* cars, or to cars while they were being held on such tracks on orders placed with the Receiver's agent by the consignees to hold their barley. (Rau Rec., 205.)

The holding of Circuit Judge Woods that the supposed arrangement between the consignees and the Terminal Association had become effective as to the cars of barley

in controversy, notwithstanding there had been no delivery of them by the Receiver to the Terminal Association and notwithstanding the Receiver still had the control and direction of them, and notwithstanding the Terminal Association had not up to the time they were destroyed knowledge of consignees, route, destination or contents of the cars, is, we submit, completely and conclusively answered by Circuit Judge Jenkins in his opinion. We quote from that opinion:

"It is held by the presiding judge that by reason of a certain supposed agreement between consignees in St. Louis and the Terminal Association—to the effect that the latter, as an inducement to barley dealers to ship over its lines, would hold cars containing shipments to such consignees on the tracks of the Terminal Association at East St. Louis—the receiver was absolved and liability under such agreement imposed upon the Terminal Association so soon as these cars had under the contract with the receiver been placed upon the tracks designated for the accommodation of the receiver's cars. I am unable to concur in this conclusion. I have sought to show that there had been no delivery of these cars to the Terminal Association. It had not knowledge of their destination. It had not knowledge of the consignees of them. They were subject to the direction and control of the receiver. The Terminal Association under its contract with the receiver had placed these cars upon these tracks for the receiver and for a compensation agreed upon. It therein was the agent of the receiver. It could not know whether these cars were to be transported over its line or the lines of the Wiggins Ferry Company; it could not know in what direction they were to be transported or their ultimate destination. When it had placed the cars on these tracks pursuant to its contract with the receiver it had nothing further to do with them until the receiver had dispossessed himself of possession and control and had invested the Terminal Association therewith. I cannot comprehend that the general agreement between the Terminal Association and consignees can become operative with respect to the contents of these cars until

delivery to the Terminal Association and it had been invested with the exclusive possession and the exclusive control of them. The force of the reasoning is not perceived whereby it is held that because in fact these goods were ultimately to go to persons who had contracted with the Terminal Association—of which contract the receiver had no knowledge—therefore these goods were held under that contract before delivery in fact to the Terminal Association and before it was invested with exclusive control of them. I do not undertake to say that the Terminal Association may not be liable to the receiver for its negligent acts causing the fire whereby this property was destroyed. Neither the question nor the party is before us. The question here is, whether the receiver is absolved from liability; whether, failing a delivery of the cars to the Terminal Association, failing a surrender by the receiver of control over them, with ignorance upon the part of the Terminal Association of their destination or their consignees, the agreement between the Terminal Association and the consignee had become operative with respect to these goods. I think not. If the receiver had directed that the Terminal Association under its contract with him should transfer these goods to the Wiggins Ferry Company, his order must have received recognition and have been carried out by the Terminal Association; and it cannot be doubted that up to the time of the fire in question the goods were so subject to the receiver's direction and control. For these reasons I think that the decrees appealed from should be affirmed."

2. That cars containing barley, after they were placed on these tracks and up to the time the Receiver had delivered to the Terminal Association the customary waybills for them, and that Association had taken them off these tracks and placed them in its portion of the yard, as testified by Felps (Rau Rec., 82), they were held by the Receiver under an arrangement between him and the consignees, and not between them and the Terminal Association, there is no doubt under the testimony. For the Receiver's chief clerk, Stapleton, who was in charge of this

business at East St. Louis under Calvart, the agent, testified, in response to questions asked of him by the Receiver's counsel, that after cars loaded with barley had been placed upon these tracks he would take the way-bills which came with the cars and notify the consignees that "*we*"—meaning the Receiver, not the Terminal Association—had a car, number so and so, loaded with barley, "Where do you want it?" and at such time as he—the consignee—got ready he would send the notice back, not to the Terminal Association, but to the Receiver's agent, to send the car to Hines' brewery, or Hiland or some other point. Thereupon he, Stapleton, would make out a new way-bill for the car, deliver it to Felps, the agent of the Terminal Association, and take his receipt. Now, why was this transaction? The following question and answer will explain:

Q. Was that a different and separate transaction, having reference to the original contract between the shipper and the Chicago, Milwaukee and St. Paul; *was it a new arrangement the consignee directed and controlled, or was it the original arrangement named by the shipper?*

A. *A new arrangement by the consignee, who placed orders with us to hold his barley.* (Stapleton's testimony, Rau Rec., 205.)

To the same effect is Calvert's testimony, Rau Rec., 235, 236, and Bosworth, Receiver, 248. Now, if it is to be presumed, as it is by the opinion of the presiding Judge, that Stapleton sent to the consignee notices that the cars containing the barley in question had arrived, and asked them where they wanted them sent, then it must also be presumed that such notices were sent in pursuance with the arrangement which Stapleton says the consignee had with him to hold their barley until further orders. If this is true, then it also follows that this par-

ticular barley was not held by the Terminal Association under any arrangement which it had with the consignee to hold barley, but was held by the Receiver under the arrangement which the consignee had with him to hold their barley.

That this correctly states the case there can be no doubt, for it fully consists with the conduct of the parties in reference to this barley while it was standing on these tracks before way-bills had been delivered therefor. For up to that time all transactions concerning it were had by the consignees with the Receiver; they treated the barley as in the Receiver's possession, and the Receiver regarded himself as having possession of it. The Receiver himself testified in response to a question asked by his counsel:

"Well, I would answer that by saying the St. Louis Terminal Association up to that point (meaning the time of the delivery of the way-bill) would not have recognized any order the consignee would have made directly to them, *and we would not have attempted to make a movement*, without the consignee, who would order through our agent in East St. Louis."

In view of such testimony and like testimony from his agent Calvert (Rec., 235, 236), and his chief clerk Stapleton (Rec., 205), that this barley while it was standing in cars on these tracks before the delivery of way-bills was held by the Receiver under an arrangement with the consignees, who placed orders with him to hold their barley for further orders, and that these further orders came directly to the Receiver from the consignees, except in occasional instances (Rau Rec., 207, 208) when they got into the hands of Mr. Roeder, a joint agent, who always turned them over to the Receiver's agent, how can it reasonably be contended that this barley was at the time

it was destroyed in the possession of the Terminal Association, or was held by it under some arrangement made with the consignees for holding their barley on its tracks. Especially when there had been no delivery of it to that Association, either actual or constructive, and when that Association could not know and did not know what the cars contained until they were delivered to it in the usual manner by delivering the customary way-bill. For, does not the testimony indisputably show that after the cars were placed on these tracks, and up to the time way-bills therefor were delivered to the Terminal Association, the Receiver held them on orders placed with his agent by the consignees to hold their barley for further orders.

Stated most favorably to the Receiver, the testimony which he in fact introduced in evidence, and the testimony which he stated he *expected* to introduce in evidence, proves, or tends to prove, that the consignees had an arrangement with both the Receiver and the Terminal Association for holding barley at East St. Louis. This testimony, if reconciled as it should be, can all be given effect, for it shows that the arrangement which the consignees had with the Receiver for holding their barley was intended to apply while it was standing on the tracks which the Receiver used between the time of its arrival at East St. Louis and the time when it was way-billed over to the Terminal Association; and that the arrangement they had with the Terminal Association to hold cars on "*their tracks*," and for other facilities in "*their yards*" applied to the cars of barley after they had come into the possession of that association in the usual and customary way, by the delivery of way-bills, and had been switched into "*their yard*" and were on "*their tracks;*" *or* to cars which the Receiver could not hold on his tracks by

reason of the limited space which he had contracted for being fully occupied by other of the Receiver's cars. For the Receiver had storage room for only 150 cars at a time, and it may well be presumed that at times he did not have sufficient space to store all the cars which the consignee desired held at East St. Louis under their arrangement with the Receiver, and they, therefore, made an arrangement with the Terminal Association to store such cars as the Receiver had not room for. Your Honors can very well see what is liable to confront these barley shippers if they shall be driven to sue the Terminal Association.

It is more reasonable, and certainly more in accord with the rules of evidence, to harmonize this testimony—all coming from the Receiver's witnesses—in this manner, than it is to eliminate from the case the testimony of Stapleton, Calvert and the Receiver himself, as would have to be done if the construction given by the presiding Judge to the testimony that Receiver's counsel stated he had expected to introduce, is adhered to. Unless this testimony can be reconciled, as we think it can and should be, then it is in serious conflict, and the conclusion necessarily follows that the burden of proof which was upon the Receiver to show by clear and satisfactory evidence that he had made a delivery of these cars and their contents before the loss occurred, has not been met. For the testimony of his witness Stapleton, that barley arriving at East St. Louis was held there by the Receiver up to the time it was way-billed out under "*a new arrangement by the consignee, who placed orders with us (the receiver) to hold his barley,*" as well as the testimony of Calvert and the Receiver, is absolutely inconsistent with the theory or claim that there had been a delivery of the

barley and cars in controversy to the Terminal Association.

While on the other hand, if the arrangement which counsel for Receiver expected to prove by certain witnesses, that the Terminal Association had agreed to hold cars of barley for the consignee in *its yards* at East St. Louis, is given the construction which is placed upon it by Circuit Judge Jenkins in his opinion, viz: that this arrangement was only intended to apply to cars loaded with barley, after there had been a delivery in accordance with the usual method of making deliveries of barley by the Receiver to the Terminal Association, and as explained by Felps (Rau Rec., 82, 86), so that the cars were, quoting from counsel's statement, "*on their tracks*," it is then not only consistent with the arrangement under which the Receiver and his witnesses, Calvert and Stapleton, say the barley was held between the time of its arrival and the delivery of way-bills therefor to the Terminal Association, but is consistent with the custom which all the testimony shows prevailed at East St. Louis, that as between the Receiver and the Terminal Association a car was never treated as delivered until the Receiver had delivered to the Terminal Association the customary way-bill, containing the name of the consignor, consignee, destination, route, number and contents of the car. And a way-bill was never delivered to that Association by the Receiver for any car loaded with barley until the consignee notified the Receiver to do so. And further, until the way-bill for a car had been delivered, and not before, did the Receiver notify the company whose car he had so delivered, had been delivered. This is significant. For it shows in whose possession the car was up to the time that the way-bill therefor was delivered.

This interpretation of the testimony is likewise consistent with the construction which, we contend, should be given the contract under which the Receiver used the tracks of the Terminal Association, viz: that while his cars were standing upon the tracks which he contracted and paid for the use of, they were in his possession as much so as if he had owned the tracks absolutely.

And further, such interpretation is consistent with the stipulation of the parties, that the cars in controversy at the time of the fire were standing on the tracks which the Receiver had the use of under his agreement with the Terminal Association. (Rau Rec., 115.) This fact is likewise significant, for it shows conclusively that the very cars in controversy were in the Receiver's possession at the time of the fire, for they were at that time, and had been, ever since their arrival at East St. Louis, standing on the tracks which the Receiver had the use of under his agreement. This agreement took the place of ownership, and possession under it was the same as possession with ownership.

We therefore most respectfully but earnestly request this court to order these cases to be certified to this court for final determination. We feel that a wrong conclusion has been reached, that a wrong construction has been given to the statement of counsel for Receiver as to what he expected to prove by certain witnesses—a construction that was not intended by the parties, a construction that petitioners should not be bound by in view of the testimony of witnesses for the Receiver, that the consignees had arranged with the Receiver to hold their barley upon its arrival at East St. Louis until further orders, and of the stipulation of the parties that the particular cars in controversy were at the time of the fire standing on

the tracks which the Receiver had the use of under his agreement with the Terminal Assseiation, a construction which raises a serious conflict between the testimony which counsel stated he expected to introduce, and the testimony of Stapleton, Calvert and Bosworth, which he did introduce in evidence, a construction which is far beyond that which petitioners' counsel ought reasonably to have expected in view of the testimony, which Receiver's counsel had introduced prior to the making of that statement, in reference to the arrangement which the consignees had with the Receiver for holding this barley, and the custom which all the testimony shows prevailed at East St. Louis, that a car loaded with barley, while standing on the Receiver's tracks, was never treated by the Receiver as delivered to the Terminal Association until his agent had delivered a way-bill for the car, taken the usual receipt therefor and the car switched from his portion of the yard. We feel also that Circuit Judges Woods and Showalter, in the consideration of these cases, have overlooked the well established rule of law, that when possession of property is once proven to be in a carrier, the presumption is that such possession continues until it is shown to be elsewhere: and that the burden is upon the carrier to show by a preponderance of proof—proof that is clear and satisfactory, not conflicting or as consistent with non-delivery as with delivery—that there has been a delivery of the possession either to the consignee or the succeeding carrier, whichever the case may be. This proof, we submit, is not present in these cases. For if the construction which we are contending for is not to be given to the statement of counsel, then it is at war with the testimony of his other witnesses Stapleton, Calvert and Bosworth, as well as with

nearly all the other testimony in the case which relates to the holding and delivery of cars loaded with barley at East St. Louis. A carrier upon whom the burden of proof rests to show delivery of property to a connecting carrier, especially in a suit by the owner to recover its value in case of loss, cannot and ought not to discharge that burden by testimony that is conflicting or is susceptible of two or more constructions, or is as consistent with non-delivery as with delivery. Such is the case here—if the construstion which the presiding Judge has given to counsel's statement is to prevail.

3. It is assumed by the presiding Judge that the Receiver's agents at East St. Louis had sent to the consignees the usual notice of the arrival of the cars of barley in question. There is no proof to sustain this presumption, and the master found that no notice had been sent by the Receiver's agent to the consignee. (Rau Rec., 67.) But conceding this to be true, then the other presumption inevitably follows, that such notice was sent in pursuance of the arrangement which Stapleton testified was "*a new arrangement by the consignee who placed orders with us to hold his barley.*" (Rau Rec., 205.) This leaves no room for the contention that this particular barley at the time it was destroyed was being held by the Terminal Association under an arrangement with the consignee. For the fact that the Receiver's agent sent notices to the consignees that he had certain cars loaded with barley consigned to them, giving the number of the cars in controversy, asking them where they wanted them sent, and that this was done in pursuance of an arrangement between him and the consignees to hold their barley on their orders, placed with him, shows conclusively that the particular barley in question at the time it was de-

stroyed was being held by the Receiver under his arrangement with the consignees to hold it, and not by the Terminal Association under is arrangement with the consignees. The presumption that the customary notices covering the particular cars of barley in controversy were sent by the Receiver's agent to the consignees, and that such notices were sent in pursuance of "*a new arrangement the consignee directed and controlled*"—"*a new arrangement by the consignee, who placed orders with us* (the Receiver) *to hold his barley*" (Rau Rec., 205), precludes the claim that the barley in question was being held under any other arrangement than that testified to by the Receiver's witnesses.

We, therefore, respectfully submit that a wrong construction has been given the statement of counsel for Receiver, and a value attached to it that is not warranted by the testimony, which the Receiver himself introduced. Either this is true, or the testimony which counsel expected to introduce is wholly inconsistent with the testimony which he did in fact introduce, in which event we contend that the burden of proof which was cast upon the Receiver was not met, and for that reason the conclusions of Circuit Judges Woods and Showalter are erroneous.

III.

CLAIM FOR CARS DESTROYED.

This claim rests on somewhat different grounds than do the claims for barley destroyed. Commercial necessities require that cars engaged in the freight carrying business of the country shall be exchanged between the various railway companies. This gives rise to a

system of car bookkeeping between the companies, and the necessity for the rule, which all companies recognize and act under, that each company, upon making a delivery of a car, not its own, to a connecting line shall report such delivery to the company owning the car, giving the number of the car, date of delivery and the company to which it has been delivered, and that until such delivery is so reported the car shall stand charged to the company last reported as having received it; and if destroyed while on the tracks of that company, such company shall be liable therefor the same as it would be for any other property which it might have in its possession for transportation or delivery.

That this system of car bookkeeping and rule of liability prevailed between the Receiver's company and the Chicago, Milwaukee and St. Paul Railway Company, there is no question under the testimony. Calvert, the Receiver's agent at East St. Louis, and Bradley, his car accountant, testified, as did Beecham, the car accountant of the St. Paul Company, to this system. (Rau Rec., 97, 99, 104, 101, 154.) The rule of liability for damaged or destroyed cars was testified to by both Mr. Beecham and Bosworth, the Receiver.

Mr. Beecham:

Q. Are you acquainted with the practice and custom which prevailed among the different railroads of the United States in respect to the settlement or payment for cars damaged or destroyed when in possession of companies not owning the cars?

A. Yes, sir.

Q. You may state what the practice or custom is.

A. The practice is for the company, through its master car-builder, for the companies on whose track the car is destroyed, to report such destruction to the owner of the car and to call for a history of the car, showing when

it was built, and then they deduct a depreciation and salvage and settle direct with the owners of the car if they so elect, but they may—it is optional with them to rebuild the car.

Q. So the company in whose possession the foreign car is, in case that car is damaged or destroyed, either rebuilds the car or pays the company owning it?

A. That is the universal practice.

Q. Is that the way all settlements are made between different companies with respect to damaged and destroyed cars?

A. Yes, sir; it is.

Q. So that a car of the Chicago, Milwaukee and St. Paul Railway Company, while in possession of the Chicago, Peoria and St. Louis Railway Company, if damage or destroyed, the latter company would pay the St. Paul Company for it or rebuild the car?

A. Yes, sir.

Q, You say that is the custom and practice on which all settlements are made between the different companies?

A. Uniform practice and custom. (Rau Rec., 142.)

Mr. Bosworth:

Q. It is a custom between all railroads, if a car of the St Paul Railway is destroyed on your track, that you pay for it?

A. Yes, sir.

Q. And that is on the ground that you have possession of the car, and in accounting for the loss of it you account to the owner and pay for it; that is a well understood custom, isn't it?

A. Yes, sir.

In this connection, it should be stated that in pursuance of the custom which Mr. Beecham and Mr. Bosworth testified to, Mr. Bradley, the Receiver's car accountant, reported to Mr. Beecham under date of November 2, 1894, four days after the fire, the cars which had been destroyed by the fire belonging to the St. Paul Company. (Rau Rec., 129, 130.) This is significant, for it shows that the car accountant regarded these cars as in the possession of

the Receiver at the time they were destroyed and accordingly reported their loss to the car accountant of the St. Paul Company.

There is likewise no dispute in the testimony concerning the possession of the particular cars in controversy. At the commencement of the taking of testimony it was formally agreed between the parties, by written stipulation signed and filed, that the thirty-eight cars in controversy were at the time of the fire standing on the tracks which the Receiver commonly used under his agreement with the Terminal Association. (Rau Rec., 115.) This puts at rest all questions concerning the actual possession of these cars. It should also be borne in mind that they were not standing on these tracks for unloading there, but were awaiting orders for their further movement; the case, therefore, is not one where cars have been set on a private side-track of the consignee for unloading, in which event it might well be said they were not in the carrier's possession; but here they were in the Receiver's possession, on his tracks, awaiting further transportation. Besides this, it was an invariable rule for the Receiver to deliver to the Terminal Association a way-bill for every car delivered to that Association. No way-bill had been passed for any of the cars in controversy; no junction report had been sent to or received by the St. Paul Company for any of the cars. (Rau Rec., 100.) They all stood charged on the books of that company as being in the possession of the Receiver's company.

Mr. Beecham testified:

Q. In whose possession were these cars I have spoken of—these thirty-eight cars—who were they charged to?
A. Chicago, Peoria and St. Louis Railroad. (Rau Rec., 103.)

The case, therefore, comes to this: That as between the Receiver's company and the St. Paul company, these cars were in the possession of the former company, and under the custom which had been established by long continued practice between the companies, it is liable for their value. If custom is to be considered in determining the liability for the contents of the cars, it should likewise be considered in respect to the cars themselves. And we submit that the testimony indisputably shows that the Receiver's company was a party to a custom or practice that fastens upon it a liability for these cars, and that it cannot evade that liability by showing that the consignees of the barley had arrangements with the Terminal Association for holding cars or giving them other facilities in its yards. Whether the Receiver's company knew of this arrangement is immaterial, so far as the rights of the St. Paul company are involved. It did know that these cars were on tracks which it had the use of, and that they were charged to it as being in its possession on the books of the St. Paul company. It, therefore, knew that under the rules and custom governing the exchange of cars between the various railway companies, that its liability for these cars would continue until it had made a delivery of them in the usual way that deliveries of cars were made at that place and such delivery reported to the St. Paul company. Such delivery not having been made or reported and the cars at the time of the fire being on tracks which the Receiver's company used under its agreement with the Terminal Association to give it facilities for handling and storing cars, it conclusively follows that the liability for these cars is with that company and not with the Terminal Association.

So far as the courts have had occasion to consider this

question, they have held that a railway company is liable for the safe carriage and return of cars belonging to other companies which come into its possession in the usual course of business, the same as it is for any other property which it handles as a carrier or as a warehouseman. So long as cars of one company are in the possession of another company, that company is accountable for them as a carrier or as a warehouseman. If they have been set on a private delivery track belonging to the consignee, for loading or unloading, then they are not in the possession of the carrier, and consequently its liability is interrupted during the time they are so out of its possession (*Railway Co.* v. *Ry. Co.*, 123 Ill., 594); but if they are placed on the carrier's tracks for loading and unloading, the rule is different, and they will be regarded as in the possession of the carrier, its liability being that of a warehouseman only. (*Ry. Co.* v. *Rolling Stock Co.*, 136 Ill., 644.) We, therefore, come back to the question: Were these cars, as between the Receiver's company and the St. Paul company, in the possession of the former company at the time they were destroyed? If they were, then it is liable therefor, both under the rule of liability, which a long-continued practice and custom had created, and the decisions of the courts. We submit that, under the second subdivision of the stipulation of August 27, 1895 (Rau Rec., 115), and the rules and custom which prevailed between the two companies, under which deliveries of cars were made and reported and the accounts thereof kept, there can be no doubt as to where the possession of these cars was at the time they were destroyed, or of the Receiver's liability.

The following cases bear upon this question:

Ry. Co. v. *Ry. Co.*, 109 Ill., 135.

Ry. Co. v. *Ry. Co.*, 123 Ill., 594.
R. R. Co. v. *R. R. Co.*, 14 Allen, 462.
Ry. Co. v. *Rolling Stock Co.*, 136 Ill., 649.
Malory v. *Ry. Co.*, 39 Barb., 488.

IV.

In conclusion, it can but be said that this case could not be better stated in all its phases than is done in the dissenting opinion by Circuit Judge Jenkins, and it is urged upon this court to carefully examine and consider that opinion. It is in harmony with the case as presented by the record, it is in harmony with the succinct and able report of the Master and the decrees entered thereon by Judge Allen at the Circuit, it is in harmony with the decisions of this and other courts, it is in harmony with the manifest justice of the case. The opinions of Circuit Judges Woods and Showalter are not only opposed to each other, but they are inconsistent with the decisions of this Honorable Court, especially in the cases of *Pratt* v. *Ry. Co.*, 95 U.S., 43, and the Covington Stockyard case, 139 U. S., 128, and the decision of the United States Circuit Court of Appeals for the Second Circuit in *Texas & Pacific Ry. Co.* v. *Clayton*, 51 U. S. App. 676, and with the decisions of the state courts as announced in *Mount Vernon Co.* v. *Ala. G. S. Ry. Co.*, 92 Ala., 296, 298; *Palmer* v. *C. B. & Q. Ry. Co.*, 13 Atl. Rep., 818; *Ins. Co.* v. *Ry. Co.*, 55 Tenn. Repts., 268. They are not therefore entitled to any strong presumption of correctness. They leave the question of law involved in a state of grave and serious uncertainty, and the petitioners in the predicament that one Bromley was left, after a litiga-

tion lasting several years over the loss of his portmanteau —he had neither portmanteau nor a right of action against either carrier for its recovery. *Midland Ry. Co.* v. *Bromley*, 8 J. Scott, 372 (84 E. C. L. 372, 382, note a).

To prevent the uncertainty in the law that will be occasioned if the decisions rendered by Judges Woods and Showalter are allowed to stand, this court is respectfully urged to grant writs of certiorari, requiring these cases to be sent here for review and final determination.

All of which is respectfully submitted.

GEORGE R. PECK,
BURTON HANSON,
Counsel for Petitioners.

Explainatory Note:

Refererence is made to the record in the Rau case only, for the reason that the record in the cases of the Chicago, Milwaukee and St. Paul Railway Company and the Hunting Elevator Company are the same as in the Rau case.

13-12 11

No. 64, 63 & 61 6a.

Office Supreme Court, U.S.
FILED
OCT 18 1899
JAMES H. MCKENNEY
Clerk

1526

Reply Brief of Peck, Carey & Hanson for Petitioner

Supreme Court of the United States.

OCTOBER TERM, A. D. 1899.

Filed Oct 18, 1899

64, 63

6

JACOB WAY,
Petitioner,

THE HOISTING ELEVATOR COMPANY,
Petitioner,

CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY,
Petitioner,

vs.

C. H. EVERETT, Receiver of the Chicago, Peoria & St. Louis Railway Company,
Respondent.

For Writs of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

REPLY TO BRIEF AND ARGUMENT FOR RESPONDENT.

1527

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1899.

JACOB RAU,
Petitioner,

THE HUNTTING ELEVATOR COMPANY,
Petitioner,

CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY,
Petitioner,

vs.

C. H. BOSWORTH, Receiver of the Chicago, Peoria & St. Louis Railway Company.

On Writs of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

REPLY BRIEF IN BEHALF OF PETITIONERS.

I.

Opposing counsel persist, notwithstanding it is stipulated, as the fact is, that the carloads of barley in question were all consigned to consignees at *St. Louis, Missouri*, via East St. Louis, Illinois, that their destination was *not* St. Louis, Missouri, but East St. Louis, Illinois. By referring to the stipulation of August 27, 1895 (Rau Rec., 31-34), the court will see that the parties to this litigation stipulated the fact to be that the several carloads of barley were consigned to the "*Teichmann Commission Company*,

St. Louis, Missouri, by way of East St. Louis, Illinois." Opposing counsel seek to evade the effect of this stipulation by refining on the words *"consigned"* and *"destined."* Whatever difference there may be in the technical meaning of these words, the word *"consigned"* as used in shipping receipts and bills of lading has a well understood and accepted meaning. In the case of goods delivered to a carrier at New York City consigned to Marshall Field & Co., Chicago, Illinois, by way of Buffalo and the lakes, or by way of Buffalo and the Lake Shore and Michigan Southern Railway, no one would presume to seriously assert that Chicago was not the *destination* of such a shipment.

It indisputably appears from the entire record in these causes that the destination of this barley was St. Louis, and that it would have been forwarded there in due time had it not been destroyed by fire.

But if opposing counsel are correct in their contention that East St. Louis was the destination of this barley, why the claim of the Receiver that he had made a delivery of it to the Terminal Association as the connecting carrier? If East St. Louis was the destinaton, then upon no rational theory can it be claimed that there had been a delivery of the barley to the Terminal Association, for there would have been no occasion to make a delivery to that Association; and the conclusion inevitably follows that the Receiver had the possession and control of it at the time of the fire, and is liable as either carrier or warehouseman.

Thomas v. *Ry. Co.*, 19 C. C. A., 90.

II.

The case of *Texas & Pacific Railway Company* v. *Clayton*, decided by this court in February last, and reported in 173 U. S., 348, is, we think, decisive of these cases. In that case the principal question involved was whether the goods at the time they were destroyed by fire were in the possession or under the control of the connecting carrier, the Steamship Company. This court held, notwithstanding that the goods had been placed by the railway company upon the wharf of the steamship company, and that was the place at which the steamship company was to receive the goods from the railway company for further transportation, they were not in the possession or under the control of the steamship company, for the reason that it had not given "*a mate's receipt*" for the goods or assumed control of them. The railway company in that case was in a more favorable position than is the Receiver in these cases; for in that case the cotton had been placed upon the wharf of the steamship company ready for delivery, while in these cases, the carloads of barley were at the time of the fire standing upon the tracks which the Receiver used for storing his cars and which he had the right to use under his agreement with the Terminal Association. (*See Agreement*, Rau Rec.,100; *Stipulation*, Rau Rec., 31, 32; *Testimony*, Rau Rec., 70, 73, 74, 75, 76, 77 and 187. *Proofs of loss sworn to by the Receiver's agent at East St. Louis*, Rau Rec., 163, 164.) The distinction, therefore, between these cases and the *Clayton* case is that the cotton in the latter case had been placed by the railway company upon the wharf of the steamship company, ready for delivery to that company, while in these cases the carloads of barley were yet stand-

ing upon the tracks which the Receiver used and had the right to use for the storage of cars under his agreement with the the Terminal Association. The cases are alike in this respect: The railway company in the *Clayton* case had not sent to the steamship company a *"transfer sheet"* which is substantially the same as a "way-bill," nor had the steamship company *"given a mate's receipt for the cotton"* as was the custom to do when a delivery was made; the Receiver in these cases had not delivered to the connecting carrier the usual way-bill indicating the number and initials of the cars, the contents, weight, rate, etc., the consignor, consignee, route and destination; neither had the connecting carrier receipted for the same as was done whenever a way-bill was delivered.

But this is not all. The Receiver's agent at East St. Louis testified (Rau Rec., 190) that an arrangement existed between the Receiver and the consignees to hold their barley until he received word from them, after having notified them of its arrival, where in St. Louis they wanted it sent, and upon getting this word he would make out a way-bill for the car or cars to be delivered, take it to the agent of the Terminal Association and take his receipt. Thereupon the Terminal Association would take the car or cars specified in such way-bill from the Receiver's tracks and place them upon its tracks. With respect to the cars in controversy, the Receiver's agent had not notified the consignees of their arrival, nor had the consignees of the barley sent the usual word to him where in St. Louis they wanted the cars sent; and the testimony shows that the Receiver was holding this particular barley at the time it was destroyed, awaiting the orders of the consignees as to where in St. Louis they wanted it sent. He, therefore, up to the time of the fire

retained full control of the cars in question, and conceding that they were on the tracks of the Terminal Association at the time they were destroyed, there had not yet been such a delivery of them as would, under the rule announced in *Texas & Pacific Railway Company* v. *Clayton, supra,* relieve the Receiver of liability,

The testimony in these cases shows, and it is undisputed, that under the custom which prevailed at East St. Louis, a car was never treated as delivered by the Receiver to the Terminal Association until a way-bill therefor had been delivered to that association and its receipt therefor taken. These way-bills were made out by the agent of the Receiver at East St. Louis, and when a delivery of a car was desired to be made to the Terminal Association or to the Wiggin's Ferry Company, such way-bill would be delivered and a receipt therefor taken. This is shown by the testimony of the Receiver's agent and his chief clerk:

"Q. When those way-bills are made out by the agent at East St. Louis they are delivered to the Terminal Association?

A. And their receipt taken.

Q. Of the way-bill?

A. Yes, sir.

Q. So you would have the receipt of every way-bill delivered?

A. Yes, sir.

Q. *Then the Terminal Association would take these cars, according to the direction on the way-bill?*

A. *Yes, sir.*" (Rau Rec., 188, 189.)

This same witness in testifying in behalf of the Receiver concerning the custom under which the barley, consigned to the Teichmann Commission Company and others, was handled by the Receiver at East St. Louis, testified as follows:

"Q. Won't you state again just what you stated be-

fore, so I will understand it, with reference to the custom in respect to barley coming to East St. Louis, *consigned to Teichmann & Co., St. Louis.*?

A. With reference to Teichmann's barley we would have orders in our office, in advance of the arrival of the cars, what disposition to make of them; others we wouldn't. Those we didn't, when they came, we sent Mr. Teichmann notice that the cars were there, what shall we do with them? Virtually that is the substance; and he would at his pleasure advise us to send the car so and so, to Hines' brewery, say. *We would make out a way-bill for the car, consign it that way and deliver it to Felps.*

Q. *Mr. Felps of the Terminal Association*?

A. *Yes, sir.*

Q. So until you received this notice back you would hold that car, awaiting transportation back across the river, if he ordered it?

A. While the car was being held there as to the relationship existing there I am not competent to say.

Q. Not asking for the relationship; if you held this car under those circumstances, awaiting the destination across the iver-order.?

A. Inasmuch as we had no engine there, and could not control where we put the car, we naturally could not hold it, because if Mr. Felps was so disposed, he could put it where he pleased.

Q. Could Mr. Felps deliver it without a way-bill?

A. Not as a general thing.

Q. Would he in any instance?

A. I have known it to be done.

Q. But that is an exception?

A. Yes, sir.

Q. *The general custom was, he would not undertake to move it until he got a way-bill*?

A. *That is right.*

Q. *And you delivered the way-bill when you got direction from the consignee, and just to the point he wanted*?

A. *Yes, sir.*

Q. *That car stood there awaiting the way-bill*?

A. *Yes, sir; awaiting that way-bill, and where Mr. Felps would put it.*" (Rau Rec., 190, 191.)

The agent of the Terminal Association at East St. Louis testified as follows:

"Q. When you receive the way-bill of a car, what do you do then?

A. Card that car out, and our yardmen are instructed to switch it out and deliver it according to the instructions.

Q. Does the way-bill contain the number of the car and destination?

A Yes, sir. Consignee, destination and route.

Q. *When you receive this way-bill and switch the car out, where do you take it?*

A. *Take the car out of their yard—their portion of the yard, and place it in the train in our portion of the yard and take it to the connection or destination indicated.*" (Rau Rec., 74, 75.)

The Terminal Association had neither the control nor custody of the carloads of barley in question at the time of the fire. While it is true these cars were on tracks in the yards of the Terminal Association, yet the tracks upon which they stood at the time of the fire were the tracks which the Receiver used and had the right to use for the storage of his cars under his agreement with that association. For the purpose which the Receiver used these tracks, they were as much his as they would have been had he owned them outright. This, in connection with the fact that the Receiver had not up to the time of the fire delivered to the Terminal Association a way-bill for any of the cars in question, and that the association had not receipted for any of them, as was the custom to do whenever a delivery was made by the Receiver to that association, proves conclusively that the carloads of barley at the time they were destroyed by fire were yet in the custody and under the control of the Receiver.

This conclusion is made absolutely certain by the testimony of the chief clerk of the Receiver's agent at East

St. Louis, who testified to the custom of handling the barley business at that station. (Rau Rec., 190.) He testified that upon the arrival of the carloads of barley at East St. Louis, he would notify the consignees thereof and ask them what place in St. Louis they wanted the barley delivered. That upon being advised by the consignees, he would "*make out a way-bill, take that to Felps* (the agent of the Terminal Association) *and take his receipt.*" The fact is undisputed that the chief clerk had not made out or delivered to the Terminal Association a way-bill for any of the cars in question. And without the delivery of a way-bill to the Terminal Association it is apparent that that association would have neither the control nor the custody of the cars. Without the information contained in the way-bill,(quoting from the opinion of Judge JENKINS):

> "*It had not knowledge of their destination. It had not knowledge of the consignee of them. It could not know whether these cars were to be transported over its line or the lines of the Wiggin's Ferry Company. It could not know in what direction they were to be transported, or their ultimate destination. They were subject to the direction and control of the Receiver.*"

The converse is likewise true, for until the Receiver had delivered the customary way-bills to the Terminal Association, and taken its receipts therefor, he still retained the full control and custody of the cars.

III.

The claimed arrangement between the consignees and the Terminal Association which is so much relied upon by opposing counsel, was not effective as to the carloads of barley in question, for two reasons:

1. *There had been no delivery of the barley to that Association.*

2. *The arrangement by its terms had not yet become effective. And the undisputed testimony, coming from the Receiver's agent at East St. Louis, shows that this particular barley at the time it was destroyed was being held by the Receiver under an arrangement he had with the consignees to hold their barley awaiting their orders as to where in St. Louis they wanted it sent.* (Rau Rec., 190.)

The arrangement claimed was, that the Terminal Association agreed to hold cars on ITS TRACKS at East St. Louis FREE OF CAR SERVICE, (Rau Rec., 239.) It is apparent that this arrangement applied only to cars on which the Terminal Association would have had the right to charge car service had no arrangement of the kind been made. If while the cars were standing on the tracks which the Receiver used and had the right to use for the storage of his cars under the agreement he had with that Association for handling and storing his cars, that Association had no right to make a charge for car service against the consignees, then the claimed arrangement had not yet become effective as to the barley in question. That the car-loads of barley in controversy were standing on the tracks set apart for the use of the Receiver under the aforesaid agreement, and that such tracks were the tracks commonly and usually used by the Receiver in handling and storing his cars, are established facts in these cases—established by the stipulation of the parties as well as by the testimony which is undisputed. *That the Terminal Association had no right to charge the consignees of this barley for car service while the cars containing it were standing on the Receiver's tracks, is too plain to admit of discussion.*

And further, it cannot be presumed that the Terminal Association would, after having given the Receiver the right to store cars on certain of its tracks, make arrangements with the consignees of such cars, that while they were standing upon such tracks, it, the Terminal Association, would hold them there *free of car service*, or make arrangements to hold them at all. The very language "hold cars on its tracks free of car service," precludes the inference that the proposed arrangement applied to cars while they were standing upon the tracks which the Receiver used under his arrangement with the Terminal Association. On the contrary, the fair and reasonable inference is that the arrangement was made to relieve the consignees of car service charges after the cars had been delivered to the Terminal Association, and the cars were being held by it on its tracks; for up to the time of such delivery, any arrangement for holding the cars would naturally be with the Receiver, and the testimony of the Receiver's agent shows conclusively that such an arrangement existed between the Receiver and the consignees of this barley, and at the time of the fire the Receiver was holding the cars in controversy under that arrangement. So that until there had been a delivery of the cars to the Terminal Association in the usual and customary way that deliveries were made by the Receiver to that Association at this place, the arrangement which that Association had with the consignees to hold their barley on its tracks free of car service did not become effective.

It follows, therefore, that the arrangement claimed had not by its terms become effective as to the cars of barley in controversy, and was not intended to be, either by the consignees or the Terminal Association, until there

had been a delivery of the barley, and the custody and control of it had passed to that Association. And the custody and control of it could not pass and were not intended to pass, until the Receiver had divested himself thereof by delivering to that Association the customary way-bill and taking a receipt therefor.

But apart from these considerations, the testimony which the Receiver himself offered proves conclusively that this claimed arrangement between the Terminal Association and the consignees was not effective as to the Teichmann Commission barley or to any barley until the Receiver's agent at East St. Louis had delivered to the Terminal Association the customary way-bill and taken its receipt therefor; that up to the time that such way-bill had been delivered, the Receiver and *not* the Terminal Association was holding this barley under an arrangement *he* had with the consignees. The following testimony given by Stapleton, the chief clerk of the Receiver's agent at East St. Louis, proves this conclusively:

"Q. Won't you state again just what you stated before, so I will understand it, with reference to the custom in respect to barley *coming to East St. Louis, consigned to Teichmann & Co., St. Louis*?

A. With reference to Teichmann's barley, we would sometimes have orders in our office, in advance of the arrival of the cars, what disposition to make of them, others we wouldn't. Those we didn't, when they came; we sent Mr. Teichmann notice that the cars were there, what shall we do with them? Virtually that is the substance; and he would, at his pleasure, advise us to send the car so and so, to Hine's brewery, say. We would make out a way-bill for the car, consign it that way, and deliver it to Felps.

Q. Mr. Felps of the Terminal Association?

A. Yes, sir.

Q. So until you received this notice back you would

hold that car, awaiting transportation back across the river, if he ordered it?

A. While the car was being held there as to the relationship existing there I am not competent to say.

* * * * * * *

Q. The general custom was, he (Felps) would not undertake to move it until he got a way-bill?

A. That is right.

Q. And you delivered the way-bill when you got direction from the consignee, and just to the point he wanted?

A. Yes, sir.

Q. That car stood there awaiting that way-bill?

A. Yes, sir; awaiting that way-bill." (Rau Rec., 190, 191.)

This testimony in connection with the testimony of the Receiver himself (Rau Rec., 228), that while he was holding this barley and prior to the delivery of the way-bill therefor to the Terminal Association, that association would not recognize any order or directions from the consignees, but that the consignees would give their directions to his agent at East St. Louis and that upon receiving such directions, his agent would make a delivery to the Terminal Association according to such directions, proves conclusively that the arrangement which counsel stated he expected to prove between the consignees and the Terminal Association had no application to the barley while the Receiver was holding it in his possession awaiting the orders of the consignees for its further movement, and only became effective after there had been a delivery of it by the Receiver to the Terminal Association in the usual and customary way that deliveries of barley were made at that point.

IV.

But it is contended by opposing counsel in their brief that the Receiver is sued as a carrier and cannot be held liable as a warehouseman.

The answer to this contention is two-fold:

1. The Receiver is not sued in the sense claimed by counsel, and the strict rules of common law pleading have no application. These are interventions in receivership proceedings, and the court has full power to make such orders or decrees as the manifest justice of the case requires.

2. The Receiver is not sued as a carrier. It is stated in the intervening petitions that while the carloads of barley were still in tansit and on their way to destination in the possession and under the control of the Receiver, he negligently caused and permitted them to be placed in close proximity to a large wooden warehouse filled with baled and loose hay through which locomotive engines were constantly passing and repassing, which hay and warehouse, taking fire, were consumed, along with the cars containing the barley. (Rau Rec., 20, 22, 52.) It is wholly immaterial whether the Receiver had possession as carrier or as warehouseman. If at the time of the fire the property was in transit as the Receiver's agent at East St. Louis stated it was at the time he swore to the proofs of loss (Rau Rec., 163, 164) then he held it as a carrier and is liable as such. On the contrary, if he held it as a warehouseman, he is liable for negligently storing it close by a long wooden warehouse filled with loose hay, which is characterized in his answer to the intervening petitions as a "veritable fire

trap." *Thomas* v. *Ry. Co.*, 19 C. C. A., 90. In disposing of the intervening petitions, the court was not bound by the strict rules of pleading at common law, but had full power to make such orders or decrees as the showing before the master warranted.

V.

The conditions and rules stated by opposing counsel, on pages 122 and 123 of their brief, as being on the back of station receipts and way-bills and bills of lading, have no application to these cases.

As to the way-bills. There are no rules or conditions on either the *front* or *back* of the way-bills, and counsel is in error in stating that there are. See way-bills, Rau Rec., 141-145.

As to the station receipts and bills of lading. The shipments of barley were not made under station receipts or bills of lading. It appears that the station receipts which were introduced in evidence were not made out or delivered to the consignees until months after the shipments were made (master's report, Rau Rec., 59); that all of the shipments of barley were made under shipping bills that had on them no limitations or restrictions whatever; that long after the barley was destrooyed, the consignees were required by the Receiver to make proof of shipment, and to do this applied to the agent of the railway company for such proof, and the station receipts which appear in evidence were then furnished. The bills of lading referred to on pages 40 and 112 of record relate to a shipment of

sash, doors and blinds from Dubuque, Iowa, and do not concern these cases.

But conceding all that is claimed by opposing counsel in behalf of the limitations and restrictions contained in the station receipts and bills of lading, the Receiver is liable under the rule announced in *Texas & Pacific Railway Company* v. *Clayton, supra;* for not having delivered to the Terminal Association the customary way-bills and taken its receipt therefor, he had not divested himself of the custody and control of the barley at the time of the fire. It was, therefore, actually in his possession and under his control, and not in the possession or control of the Terminal Association.

VI.

But counsel for Receiver says that, conceding the carloads of barley were being stored by the Receiver at the time of the fire on tracks which he used under his agreement with the Terminal Association, as in fact they were (*stipulation*, Rau Rec., 31-34), he is still not liable for the loss, for the reason that while they were so held he held them as a warehouseman. The answer to this contention is that he had arranged with the consignees to hold their barley awaiting their orders as to when and where it should be forwarded to St. Louis. (Rau Rec., 190, 191.) While so holding it, he was bound to exercise reasonable care toward it, and under all the authorities it was negligence to allow or permit this barley to be stored by a long wooden warehouse—"a veritable fire trap"—through and by which locomotive engines were constantly

passing, which taking fire was itself consumed along with the cars of barley. The case of *Thomas* v. *Ry. Co.*, 19 C. C. A., 90, is precisely in point.

Respectfully submitted.

GEORGE R. PECK,
GEORGE P. CARY,
Solicitors for Petitioners.

BURTON HANSON,
Of Counsel.

IN THE

SUPREME COURT

OF THE UNITED STATES

OCTOBER TERM, A. D. 1897

MERCANTILE TRUST COMPANY,

Complainant

vs.

CHICAGO, PEORIA & ST. LOUIS RAILWAY COMPANY, *et al.*

Defendants.

IN THE MATTER OF THE APPLICATION FOR WRITS OF CERTIORARI BY THE INTERVENERS, THE CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, THE HUNTTING ELEVATOR COMPANY AND JACOB RAU.

Brief in Opposition to Granting of Certiorari.

BLUFORD WILSON,
PHILIP BARTON WARREN,
Solicitors for Respondents.

NOTE:- For convenience, all references are to the record in the Rau case; the same evidence being taken in all three cases.

Statement.

The intervener, the Chicago, Milwaukee & St. Paul Railway Company, was the owner of thirty-eight (38) cars mentioned and described in its petition. During the evening of the 28th day of October, 1894, while on the tracks of the Terminal Railroad Association of St. Louis, in its yards at East St. Louis, they were damaged by fire to the extent of $9,033 73.

The destination of these cars was shown by the way-bills, which accompanied them, except in a few cases, and in those cases by a copy of the shipper's receipt. It appears that no original shipper's receipts were issued, but that after the fire the shippers demanded receipts and the agent of the railway company would not issue one without marking it "copy" or "duplicate." These way-bills and receipts were introduced in evidence by interveners. As to all the cars, except five, the way-bills show that they were to be moved from their point of origin to East St. Louis, although in a column under the head of "marks and consignees" the name of the consignee and the words "St. Louis, Missouri," appear. As to one car, No. 46064, the way bill reads from Wycoff, Minnesota, to St. Louis. This, however, is apparently a mistake, inasmuch as the shipment consisted of that car and another numbered 43222, and the way-bill for the latter read from "Wycoff to East St. Louis." (They both arrived at East St. Louis, October 25th, the same hour

and train, 1:45 p. m. R. p. 259). In addition to this on the station receipts for these two cars, under head of marks and consignees, appears the words "The Orthwein Grain Company, East St. Louis." (R. pp. 171, 173.)

As to cars Nos. 10071, 34908, 10536 and 3218 the way-bills introduced in evidence read on their face "Way-bill of freight forwarded from Lake City to St. Louis." These four way-bills are marked "Copy" and there is nothing in the evidence to show that they are true copies or why the originals were not introduced. The cars went into yard at East St. Louis and were destroyed, along with other barley cars in store there.

The initials, numbers, route, origin and destination of the cars, were as follows:

Initials.	Numbers.	From	To	
C., M. & St. P.	32986	La Crosse, Wis.	East St. Louis	R. pp. 156-159
" " " " "	20022	" "	" "	
" " " " "	1100	" "	" "	
" " " " "	6842	McGregor, Iowa	" "	R. pp. 162-164
" " " " "	10720	" "	" "	
" " " " "	18126	" "	" "	
" " " " "	3728	" "	" "	
" " " " "	4126	" "	" "	
" " " " "	2598	" "	" "	
" " " " "	12336	" "	" "	
" " " " "	37506	" "	" "	
" " " " "	11836	Prairie DuChien, Wis	" "	R. pp. 167-169-173-174
" " " " "	33090	" "	" "	
" " " " "	16802	" "	" "	
" " " " "	12	" "	" "	
" " " " "	680	Wycoff, Minn.,	" "	
" " " " "	46064	" "	St. Louis	
" " " " "	43221	" "	East St. Louis	
(Station receipts for cars No. 46064 and 43222 under marks and consignees is "The Orthwein Grain Co., East St. Louis."				
C., M. & St. P.	43080	Lime Springs	East St. Louis	
" " " " "	32194	"	" "	
" " " " "	34574	"	" "	

Initials.	Numbers.	From	To	
C., M. & St. P.	17272	La Crosse	East St. Louis	R. pp. 368-370
" " " "	3524	Savannah	" "	
" " " "	31098	"	" "	
" " " "	33134	"	" "	
" " " "	2430	"	" "	
" " " "	31204	"	" "	
" " " "	46992	"	" "	
" " " "	15944	"	" "	
" " " "	6364	"	" "	
" " " "	12886	"	" "	
" " " "	10071	Lake City	St. Louis	
" " " "	34908	"	"	
" " " "	10536	"	"	
" " " "	3218	"	"	
" " " "	1232	La Crosse	East St. Louis	R. p. 169
" " " "	1154	Ossian, Iowa	" "	
" " " "	38108	" "	" "	

JACOB RAU.

The intervener, Jacob Rau, delivered to the Chicago, Milwaukee & St. Paul Railway Company on the 10th and 16th days of October, 1894, two (2) car loads of barley, Nos. 46064 and 43222; said barley was damaged or destroyed by the same fire, while in the yards of the Terminal Railroad Association of St. Louis, at East St. Louis, to the extent of $1 144.07; the said cars were consigned as follows:

No. 46064, from Wycoff to St. Louis, as shown by way-bill, but as shown by station receipt destination appeared to be East St. Louis; No. 43222, from Wycoff to East St. Louis. (R. pp, 48, 171, 172, 173.)

HUNTTING ELEVATOR COMPANY.

The intervener, the Huntting Elevator Company, delivered to the Chicago, Milwaukee & St. Paul Railway Company ten (10) car-loads of barley on the following

days: On the 24th day of September, 1894, cars Nos. 11836 and 33090; on the 13th day of October, car No. 34574; on the 15th day of October, car No. 32194; on the 18th day of October, car No. 43080; on the 12th day of October, car No 12; on the 20th day of October cars Nos. 178, 7285, 16802 and 46648; the said barley was damaged by the same fire to the extent of $2,600.56, while in the yards of the Terminal Railroad Association of St. Louis, at East St. Louis; the cars were consigned as follows: (R. pp. 49, 167, 168, 169, 173, 174)

Initials	Numbers	From	To
C., M. & St. P.	11836	Prarie DuChien	East St. Louis
" " " " "	33090	" " "	" " "
" " " " "	16802	" " "	" " "
" " " " "	46648	" " "	" " "
" " " " "	7286	" " "	" " "
" " " " "	178	" " "	" " "
" " " " "	12	" " "	" " "
" " " " "	43080	Lime Springs,	" " "
" " " " "	32194	" "	" " "
" " " " "	34574	" "	" " "

The foregoing statement is of facts upon which there is no dispute, the greater portion of which is stipulated. (R. pp. 46, 50). After the fire mentioned each one of the petitioners filed an intervening petition in the cause of the Mercantile Trust Company against the Chicago, Peoria & St. Louis Railway Company, pending in the Circuit Court of the United States for the Southern District of Illinois, in which C. H. Bosworth had been appointed receiver of the said railway company, and which railway, at the time of the fire, he was operating as such receiver. The petitions, however, make the railway company and not

the receiver party defendant, and aver that the property destroyed was at the time "in the possession of and under the control of the said defendant railway company" as a common carrier. (R. p. 34).

The defense is that the Terminal Railroad Association of St. Louis had actual custody, care and control of the property at the time of the fire which was caused, and the property destroyed, by its gross neglect. (R. p. 37).

The Terminal Railroad Association of St. Louis is a company owning tracks in East St. Louis and across the bridge into St. Louis, which connect the various railroads centering there. Its business is that of interchanging or hauling cars coming in on one railroad and delivering them to another railroad; also to haul cars destined to St. Louis from the termini of the several railroads in East St. Louis across the bridge into St. Louis. As a regularly incorporated common carrier it performed like service for all railroads terminating at East St. Louis, its only competitor being the Wiggins Ferry Company. The contract originally entered into between the Terminal Railroad Association and the Chicago, Peoria & St. Louis Railway Company contemplated only these classes of business, and fixed a charge for the same, *except cars on which the Terminal Company received a bridge toll, which were to be hauled free.* (R p. 39-111.) All the cars in controversy, were of the latter class.

When the petitioners filed their interventions in this cause the receiver was not fully aware of all the circumstances surrounding the particular shipments of grain referred to in the various petitions. He therefore was compelled to make the best answer he could in the light of his knowledge at that time. He filed his answer to all of them, alleging a delivery to the Terminal Railroad Association, in the due course of business, of all these shipments. Later on, during the taking of evidence, other facts were developed. To cover these the receiver filed an amended answer. In this amended answer he alleged that the shipments in question, at the time of the fire, had been delivered to the Terminal Railroad Association, and were under its sole custody and control for the convenience of the consignees. (R. pp. 58-60.)

The claims of the petitioners, except the Chicago, Milwaukee & St. Paul Railway Company, are for damages of barley shipments caused by the fire of October 28th, 1894. These barley shipments originated in Iowa, Wisconsin and Minnesota, at various points on the Chicago, Milwaukee & St. Paul Railway.

The barley was hauled by the Chicago, Milwaukee & St. Paul Railroad Company to Rock Island; there delivered to the Rock Island & Peoria Railway, and hauled to Peoria; there delivered to the Peoria & Pekin Union Railway, and hauled to Pekin; there delivered to the receiver of the Chicago, Peoria & St.

Louis Railway, and hauled to the terminus of its line in East St. Louis, and there delivered, upon the designated "Ys" of the Terminal Railroad Association, where the engines of the Terminal Association took the cars and set them on its own tracks at East St. Louis. (R. pp. 82, 198, 199, 204, 224, 227, 231, 241, 249.) At the time of the fire these cars had been accumulating at this last point for some time. One of them coming in as early as September 28, others about the middle of October, and others not until the afternoon of the night of the fire. (R. p. 259.)

This barley was to be sold again by the consignees, the grain brokers in St. Louis, and by arrangement between them and the Terminal Railroad Association it was held at the place where it was damaged until these sales were effected and a reconsignment of the barley made to the purchasers from the grain brokers. (R. p. 83, 155, 175, 260, 263, 265, 267, 204, 208, 228, 229, 234, 238, 249, 331, 334.) The periods for which these cars remained on the tracks at East St. Louis was controlled by the sale of the barley by the consignees, which in its turn was controlled by the state of the market. (R. pp. 206, 260, 263, 334.)

All of these intervening petitions were consolidated, and the evidence taken is to apply to them all. The master, after having heard and considered the evidence, filed a separate report in the case of each

petition, but inasmuch as nearly all the points in controversy are raised by the facts surrounding each petition, they have all been treated in one argument.

Upon hearing before the Master in Chancery he reported in favor of all of the interveners, to which reports exceptions were duly taken and filed. (R. p. 71.)

The matter then came on for hearing before the Circuit Court upon these exceptions, which upon consideration were overruled and decrees entered in favor of the interveners, in the amounts claimed by them, together with interest from the date of the master's report. (R. p. 73.)

From these decrees, appeals were prayed and perfected to the United States Circuit Court of Appeals for the Seventh Circuit, both by the receiver and the Chicago, Peoria & St. Louis Railroad Company of Illinois, the assignee of the purchaser of the railway property at the foreclosure sale (R. p. 357, 360). Said appeals came on for hearing in said Court of Appeals before their Honors, Judges Woods, Jenkins and Showalter and were argued, and subsequently, on the 25th day of February, 1898, the said Court of Appeals handed down its decision, wherein and whereby the said decrees of the United States Circuit Court for the Southern District of Illinois, were reversed (R. p. 403); his Honor, Judge Jenkins, dissenting therefrom (R. p. 386)

On the 27th day of March, 1898, the appellees in said Court of Appeals filed their respective petitions for rehearing (R. p. 407), which were subsequently, on or about the first day of April, 1898, overruled (R. p. 408).

From these decrees of the United States Circuit Court of Appeals the said appellees therein have made this application to this Court for writ of certiorari, upon three grounds, which we shall discuss in the argument following.

Argument.

The question submitted to the court on this application is whether or not the court will, in its discretion, issue a writ of certiorari for the purpose of reviewing the decrees of the Court of Appeals.

Opposing counsel have neither filed with their petition an assignment of errors or of variance; nor have they in their brief and argument cited authorities or made arguments in support of the granting a writ of certiorari in these cases. The only argument in support of the writ is to be found in the petition itself, where three reasons are alleged why the judgment of the Circuit Court of Appeals should not be allowed to stand as a final judgment in these cases.

I.

This is not a proper case for the issuing of a Writ of Certiorari.

We fully appreciate the fact that the issuing of a writ of certiorari by the Supreme Court of the United States is a matter almost entirely discretionary, and that therefore it is impossible to lay down rules which shall be binding in all cases. We desire however, to call the attention of this court to the fact that in *Forsythe vs. City of Hammond, 166 U. S., 506,* it being of the opinion that "a power so broad and comprehensive if carelessly exercised might defeat the very thought and purpose of the act creating Courts of Appeals," early prescribed narrow limits for its exercise. The language used by this Honorable Court in that case is:

> "Thus, while this power is co-extensive with all possible necessities and sufficient to secure to this court a final control over the litigation in all courts of appeals, *it is a power which will be sparingly exercised,* and only when the circumstances of the case satisfy us that, the *importance of the question involved,* the *necessity of avoiding conflicts* between two or more courts of appeal, or between courts of appeal and the court of a state, or some matter affecting the interests of this nation in its *internal or external relations,* demands such exercise."

(a) The importance of the questions involved does not justify a review by this Court.

In their petitions opposing counsel urge as one of the reasons for this court taking the cases, the importance of the questions involved.

The elements which they allege as entering into the cases to make them important, are that the amount involved is large and the commercial interest involved is of a public character. The amount involved is about $20,000.00 (R. p. 177, 182); the commercial interests involved are those of certain barley shippers in the Mississippi Valley. Opposing counsel however argue that inasmuch as there are other shippers, whose goods may be similarly situated as these were, this fact changes the nature of the interest from private to public. If this argument is considered sound, the character of every litigation can be changed from private into public on the same grounds, and every suit therefore becomes of the greatest importance because there may be many other parties whose interest and property are similarly situated.

We know of no rule that has been laid down by which it can be determined whether the question involved in a litigation is of that importance which justifies the issuing of certiorari. We submit, however, that if this importance is to depend on its public character, litigation of private interests can not be changed

into public by simply saying that there are many other persons, whose property and interests are similarly situated with those of the particular parties in litigation.

It is to be remembered that this court citing *Re Woods 143 U. S., 202* in *Law Ow Bew vs. The United States, 144 U. S., 47*, said:

> "The Act of Congress of March 3, 1891, establishing Circuit Courts of Appeals and defining and regulating jurisdiction of the courts of the United States was passed to facilitate the prompt disposition of cases in this court and to relieve it from the oppressive burden of general litigation, which impeded the examination of cases of public concern, and operated to the delay of suitors."

From that quotation we glean two important announcements relative to the issuing of certiorari. The first, and that which is always to be kept in view, is that the Act of Congress establishing Courts of Appeal *was for the purpose of facilitating* the prompt disposition of cases in this court and *to relieve it from* the burden of general litigation. i. e, *litigation concerning private interests.* Second, that the cases which this court consider of sufficient importance to require them to be certified to it, *are those of public concern.* In the reports are to be found very few cases in which this court has expressed its reasons for granting or refusing certiorari, but in *Forsythe vs. Hammond, 166, U. S., 506*, practically all of such cases are reviewed. Upon these cases we must depend for the reasoning which moved the court to grant or deny certiorari.

Of those cases the only one in which the writ was granted because of the importance of the question involved was that of *Exparte Lau Ow Bew, 141 U. S., 583.* There the question involved was the construction of Acts of Congress in the light of treaties with foreign governments, *a matter not only of public but of international concern.*

In *exparte Woods, 143 U. S, 202,* the court denied the certiorari because the question involved was not of sufficient importance. saying:

> "But we do not regard the inquiry as to whether it was settled law in the State of Minnesota, that a judgment of dismissal in a former suit, such as pleaded here, was not a bar to a second suit upon the same cause of action, or whether the law in respect of recovery by a servant against his master for injuries received in the course of his employment was properly applied on the trial of this case, as falling within the category of questions of such gravity and general importance as to require the review of the decisions of the Circuit Court of Appeals in reference to them."

If opposing counsel in that case did not, they could have, with as much force as opposing counsel do here, argue that there were hundreds of other citizens of Minnesota who had judgments of dismissal and their interests would be affected if the law of the State was not settled as to whether or not such a judgment was a bar to a second suit upon the same cause of action; or that there were thousands of servants in the State of Minnesota who were subject to the receipt of injuries daily, and therefore it was a

matter of public concern that the law should be definitely settled as to their rights on the trial of causes then pending or thereafter to be brought.

In *Chicago & Northwestern vs. Osborne, 146 U. S., 354*, this court denied petition for certiorari on the ground that the question involved was only a matter of private interest, and in speaking of that case in *Forsythe vs. Hammond, supra,* it said:

> "We have declined to issue writs of certiorari in cases where, there being only a matter of private interest, there had been no final judgment in the Court of Appeals. * * * On the other hand, in *United States vs. The Three Friends*, at the present term, *166 U. S., 1*, we issued a writ of certiorari in a case appealed to the Circtit Court of Appeals before any action had been taken by that court: but this was in view of the fact that the question involved was one affecting the relation of this country to foreign nations, and therefore one whose prompt decision by this court was of importance; not merely for the guidance of the executive department of the government, but also to disclose to each citizen the limits beyond which he might go in interfering in the affairs of another nation, without violating the laws of this."

Therefore it is to be seen that the test in all the cases in its relation to importance and gravity, is as to whether or not it is of a public nature *per se*. From the only light which the Supreme Court has given us thus far in this matter, we submit that it is not intended to take cases which operate on the public *only indirectly*. As we have argued above, all litigation is susceptible of such a characterization, and

therefore if the same is to be accepted, the *limit* which Congress placed upon the power of granting certiorari *is dissolved* by ingenious argument.

(b) The opinions of a majority of the Court of Appeals are not opposed to each other.

It is alleged in the petition (p. 15) as a reason why certiorari should be granted, that the opinions of the majority of the Court of Appeals are not entitled to any strong presumption of correctness because they are opposed to (1) each other, and (2) to the opinion of the District Judge in the Circuit Court

The only case in which it has been suggested by this court that a division of opinion of the judges of the Court of Appeals will justify a review by this court is that of ***Forsythe vs. Hammond, 166 U. S., 506;*** but there the division of opinion is not that which is alleged in the petition in this case. There this court said (p. 512):

> "As the Courts of Appeal would often be constituted of two Circuit Judges and one District Judge, a division of opinion between the former might result in a final judgment where the opinions of two judges of equal rank were on each side of the questions involved."

To bring the case at bar within the division of opinion suggested in ***Forsythe vs. Hammond***, it will be necessary to show that either Judge Woods or Judge Showalter was a District Judge, so that we would have in this case a District and Circuit Judge

on the Appellate bench in opposition to a Circuit and District Judge, the former on the Appellate bench and the latter on the Circuit bench. If this were alleged and shown to be the fact then we would here have a final judgment where the opinions of two judges of equal rank were on each side of the questions involved.

Such, however, is not even alleged. On the contrary it is simply averred that the opinions of the two Circuit Judges on the Appellate bench are opposed to the one Circuit Judge on the Appellate bench, and one District Judge on the Circuit bench. This is the inevitable result which will follow the reversal of any judgment of a Circuit Court, unless the judgment of the Court of Appeals happens to be unanimous. If every judgment of the Court of Appeals reversing the Circuit Court is not unanimous, then according to the logic or opposing counsel, it is subject to review by certiorari.

We do not believe, however, that a consideration of the opinions delivered by Judges Woods and Showalter, the two judges constituting the majority of the Court of Appeals will sustain the assertion that they are opposed to each other.

It is to be remembered that in the two lower courts four appeals were submitted and considered together. These appeals were the representative of

many other cases pending in the Circuit Court. The four cases submitted to the Court of Appeals presented two classes of shipment—the three involved in this application were barley shipments consigned to St. Louis brokers to be sold on "change," and the fourth case was a through shipment of merchandise destined to Alabama.

The major part of the opinion of Judge Woods consists in a consideration of three cars of barley shipments, and he reverses the decree of the Circuit Court which held the receiver liable for such shipments, on the ground that a certain agreement had been entered into between the consignees and the Terminal Railroad Association, whereby the latter was to hold these barley shipments on its rails in East St. Louis for the purpose of giving the consignees an opportunity of selling the same in the market, and thereafter give to the shipments a new destination As to the other case, that of the through shipment of merchandise, Judge Woods simply holds that inasmuch as the agreement did not have any application to it, the decree of the Circuit Court should be affirmed.

The major part of the opinion of Judge Showalter consists in a consideration of the liability of the receiver in the case of the through shipment of merchandise, and in demonstrating that a certain agreement entered into between the Terminal and the receiver did not constitute a lease of the rails of the latter to the

former, nor make the former the agent of the receiver, in opposition to the position taken by Judge Jenkins (not Judge Woods) that this agreement did accomplish such object.

The only opposition in the opinions of Judges Woods and Showalter is in the disposition of the case which involved the through shipment of freight—Judge Woods being of the opinion that the receiver was liable, and Judge Showalter that he was not liable. That case, however, is not before the court in this application.

In the consideration of these points it must always be born in mind that they disposed of two different classes of cases. On the barley question we have Judges Woods and Showalter concurring and constituting a majority, and in the through shipment case, we have Judges Woods and Jenkins concurring, and therefore constituting a majority.

We hardly think it necessary to comment upon the allegation in the petition (p 15) that the opinions of the majority of the court are opposed to those announced by the minority of the court and the Circuit Court. In the first place, the Circuit Court rendered no opinion, and in the second place, if it had, it would be impossible for the Court of Appeals to have reversed it without rendering an opinion which was opposed to it.

(c) This decision is not in conflict with other decisions.

As another ground for the granting of certiorari opposing counsel allege in their petition that the decision of the minority of the judges in this cases is in conflict with the decisions of the courts in

Pratt vs. Railway Co., 95 U. S., 43.
Covington Stock Yards Case, 139 U. S., 128.
Texas & Pacific Ry. Co. vs. Clayton, 51 U. S. A., 676.
Mt. Vernon & Alabama Ry., 92 Ala., 296.
Palmer vs. C., B. & Q., 13 Atlantic Reporter, 818.

The decision in the case at bar is: (1) that where barley shippers consign car loads of barley to commission merchants without notifying the railroad company that they, the shippers, are still the owners, the consignees have the right to change the original destination of the shipment; (2), that where the consignees enter into an agreement with a terminal railroad, by which the latter is to receive such barley shipments from the connecting carrier and hold them in storage for the convenience of the consignees and until the latter shall make a sale of such barley on a grain exchange, that there has been a sufficient delivery of such shipments by the connecting carrier to the Terminal Railroad, when, pursuant to custom, the connecting carrier deposits such cars on a certain designated "Y" of the Terminal Company and the

latter takes physical possession and control of such cars, by attaching its own engines to them and hauling them to a point on its own rails, there to await the convenience of the consignees.

In *Pratt vs. Railway Company, supra*, this court expressly recognized and announced the principle that where by custom or agreement there is a designated place of deposit between two connecting carriers, delivery is made by such deposit, although shipping directions had not as yet been delivered from the first to the second carrier.

The *Covington Stock Yards case, supra*, involved a controversy wholly foreign to the one in the case at bar. The main question determined there was whether a common carrier could be compelled to receive and deliver live stock at a platform or chute provided by the shipper, or deliver the same free from extra charge for its passing through the yards of the appellant. The court there said:

> "The railroad holding itself out to be a carrier of live stock was under a legal obligation, arising out of the nature of its employment, to provide suitable and necessary means and facilities for receiving live stock offered to it for shipment over its road and connections, as well as for discharging such stock after it reaches the place to which it was consigned."

It cannot be said that the obligation "to provide suitable and necessary means and facilities for receiving" the barley from the receiver for shipment, "as

well as discharging" such barley "after it reaches its destination," had not been fully performed before the fire. If the receiver was under obligation by reason of his employment as a public carrier in addition to transporting the barley the whole length of his rails, to provide a distributing warehouse at a point beyond his own terminus, and there hold and store the grain subject to the convenience of the consignees, then the Covington Stock Yards case might become pertinent, and the rule there announced that it would not concern the shipper whether the receiver discharged this obligation, or employed the Terminal Railroad to do it, would be applicable.

But such storage of grain is no part of a common carrier's duty, and as Judge Showalter said of this case (R. p. 398):

> "In the *Covington Stock Yards Case, 139 U. S., 128*, it was ruled in effect, that a carrier bringing cattle to a consignee who had provided himself with structures connecting his yards with the railroad track, whereby cattle might be unloaded directly from the cars into his yards, could not refuse to unload the cattle of such consignee into the yards, and by means of the appliances provided by him, for the mere purpose of compelling him to pay a terminal fee at the cattle yards provided by the company, or provided by an independent corporation. This case, as I can see, has not here the application or significance suggested by counsel for appellees. Of the cars in question, one was to go to Birmingham, Alabama, the others, loaded with barley, to different points in and about St. Louis, as directed by the consignees. Appellant did not engage to furnish unloading facilities for these cars. He was under no obligation to these appellees to provide terminal facilities for unloading. He handled the cars of freight as an entirety."

To this we desire to add the further suggestion that the receiver not only did not engage, or in any way was such obligation upon him, to furnish unloading facilities for these cars, but from the very nature of the business it was never intended that these cars should be unloaded in the yards of any railroad. They were barley consigned to commission brokers who sold them on "change" to brewers and other consumers, to whom the cars would be dispatched, and in whose warehouses they would be unloaded.

The case of *Texas & Pacific vs. Clayton, supra*, is in perfect harmony with and follows that of *Pratt vs. Railway Company, supra*, and therefore, we submit, is also in harmony with the decision of the Court of Appeals in this case. There the court says:

> "It may be safely affirmed as a proposition applicable to all the cases, that a deposit of the goods, with notice *expressed or implied*, at any place where the second carrier has control, conformable with the usage created by the course of business between two carriers, is a sufficient delivery and discharges the first carrier."

That is the exact principle which the Court of Appeals applied to the facts in the case at bar.

In *Mt. Vernon vs. Alabama Southern R. R., supra*, the Alabama court holds that there can be no delivery from one connecting carrier to another, unless the second carrier has received full shipping directions. This, no doubt, is the general rule. We submit, however, that even if the court in that case had had an opportunity

to pass upon the exception to the rule, which is founded on agreement and custom, and had directly refused to have held that a deposit of freight pursuant to custom and agreement by one connecting carrier on the premises and into the physical possession of the other, was a sufficient delivery to have transferred the carrier's liability, such decision would have been in direct conflict with that of this honorable court in *Pratt vs. Railway Co., supra.* The Court of Appeals in this case would then have to either render a decision in conflict with the Supreme Court of Alabama, or with the Supreme Court of the United States, and we hardly think that under such circumstances the conflict of decision between the Court of Appeals and the State court would be sufficient ground upon which to grant certiorari.

We have not the case of *Palmer vs. C., B. & Q., supra,* before us, which opposing counsel contend conflicts with the decision in the case at bar. However, for the purpose of this argument, we may concede all that opposing counsel contend for as to such conflict, and the Court of Appeals would only have found itself in the same predicament as to choosing between a decision which is in conflict with a State court, or one which is in conflict with the Supreme Court of the United States. The only conflict in these cases is between the court and opposing counsel, and is a conflict of fact only.

We therefore earnestly submit that the petitioners have not brought themselves within the narrow limits laid down by this court for the granting of certiorari. Inasmuch, however, as opposing counsel have seen fit to go into the merits of the case in this application for certiorari, we are also forced to meet their argument, and accordingly, submit the following:

II.

At the time of the Loss and Damage the Liability of the Reciver as a Common Carrier had ceased

(a) The cars had arrived at their place of destination.

The contracts of carriage entered into with the railway companies on their face show that the goods were to be moved from the point of shipment to East St. Louis The only evidence on this point is the way-bills which were introduced by interveners, and which in all but five (5) instances read "Way-bill of freight forwarded from (point of origin) to East St. Louis." These way-bills are the papers by which these cars had been moved along their entire route, and were the only instructions which the receiver had for moving the cars from Pekin. It is true that in many of these way-bills, under the head of "marks and consignee," appeared the name of some commission firm "St. Louis

Missouri." ***But this in no wise controlled the movement of the cars.*** The way-bills said that the cars must be moved from point of origin to East St. Louis. The words appearing under the column of "marks and consignee" simply indicated who the consignee was and where he lived. This was for the convenience of the carriers, and not instructions to them to move bulk grain to the residence of the consignee. The destination was plainly and unqualifiedly East St. Louis.

(b) The consignees also designated East St. Louis as the destination.

If, however, we are wrong in our contention that by the contract of carriage East St. Louis was the destination, and the court can find in the contract itself, the intentions of the parties otherwise expressed, that the goods were to be delivered, not at the destination named in the head of the way-bill, but at the place of residence of the consignee indicated under the head of "marks and consignee," then we desire to call to the attention of the court the evidence, which we contend establishes the fact that the consignees themselves designated East St. Louis as the destination. If this evidence bears us out it proves one of two things: First East St. Louis was the destination, not only by contract of carriage, but also by the intention of the parties themselves; or, Second – that the consignee exercised his right to change the destination from St. Louis to East St. Louis.

The evidence which we refer to is the stipulation of record that the consignees. Otto Teichmann, Henry Grieve, L. Lemke and Charles Orthwein, would testify that the (260-2):

> "Terminal Railroad Association personally solicited this particular barley business, originating on the Chicago, Milwaukee & St. Paul Railroad, upon which this controversy is pending; that these solicitations by the Terminal Railroad Association were made to all the barley dealers in St. Louis to whom the particular consignments of barley were made which are now in litigation; that the Terminal Railroad Association, as an inducement to barley dealers and shippers, agreed to hold the cars on their tracks at East St. Louis, and offered other facilities in and about their yards at East St. Louis, by which the St. Louis Terminal Railroad Association succeeded in securing the business of all the shippers, by that term I mean the consignees and shippers, except the business of the John Wall Commission Company, whose business was being handled by the Wiggins Ferry Company, a competing line with the St. Louis Terminal Railroad Association, and that at a later day they also secured the business of this last named firm. And that this solicitation was made in the interest of the Terminal Railroad Association for the express purpose of having the business sent down the east side of the Mississippi River so as to give them the benefit of the transportation across the river at East St. Louis to St. Louis, in competition with lines west of the Mississippi River."

If it can be fairly contended the original destination was St. Louis, then it can not be denied that from the above stipulated evidence the consignees changed the destination to East St. Louis, and their right to do so only remains to be discussed. On this point, the weight of the authorities is thus summed up in *Ency. of Law, Vol. II, (1st ed.) p. 897:*

> "The right to demand a re-delivery by the carrier, or to change the original destination of freight, depends upon the ownership of the goods, and the notice to the carrier of such ownership. The rule is said to be that where the consignor is known to the carrier to be the owner, the carrier must be understood to contract with him only for his interest, upon such terms as he dictates in regard to the delivery, and that the consignee is regarded simply as an agent selected by the consignor to receive the goods at a place indicated. Where the carrier has no notice of the ownership of the property other than that implied from the relation of the parties to each other as consignor and consignee, the latter is the implied owner, and the carrier is justified in taking his directions as to the manner of delivery."

In *Southern Express vs. Dickson, 94 U. S., 549*, the court held that inasmuch as evidence was introduced and the jury found the ownership was in the consignor, and that the railway company had notice of it, the railway was not justified in taking the directions of the consignee as to a change of destination, but interpreting the cases cited to sustain the right of a consignee to change the destination, the court said:

> "The numerous cases cited by the plaintiff in error, to the effect that any delivery to the consignee which is good as between him and the carrier is good against the consignor, are cases where the carrier has no notice of the ownership of the property other than that implied from the relation of the parties to each other as consignor and consignee. This gives to the consignee the implied ownership of the property, and hence justifies the carrier in taking his direction as to the manner of delivery."

Another case which seems to be on "all fours" with the cases at bar, is *London & Northwestern Railway Company vs. Bartlett, 7 H. & N. 400*, where wheat was held at the station by order of the consignee, instead

of being delivered at consignee's mill, according to the contract contained in the bill of lading. It was held that the carrier was exonerated for injury to wheat caused by delay in the station, in the absence of knowledge by it that the wheat belonged to the consignor; the court said:

> "It is, I think, quite clear that the consignee of goods may receive the goods at any stage of the journey, and I think that if the consignor directs the goods to be delivered at a particular place, it is a contract to deliver the goods at that place and not elsewhere. The contract is to deliver the goods there unless the consignee shall require them to be delivered at some other place."

Other cases were those of *Mitchell against Ede, 11 A. & E. 888; Foster against Frampton, 6 B. & C., 107*, which are decided on similar principles. Among the cases discussed by the court in *Southern Express Company vs. Dickson, 94 U. S., 549, was the case of Sweet against Barney, 23 N. Y., 335*, where a package of money was sent by express directed to "The People's Bank, 173 Canal Street, New York City." The package was delivered to an agent of the People's Bank at the express office, and was stolen from him. It was held that the delivery exonerated the express company from responsibility, since it had no notice that the money was not the property of the bank, the consignee.

Applying the above doctrine, the question to be determined is, did the carrier have notice that the consignor, and not the consignee, was the owner of

the goods. There is no conflict in the evidence. The intervening petitioners themselves testified that they in no way notified the carrier that they were the owners of the goods. (R. pp. 316, 322, 328, 336, 341, 345.)

The evidence of the consignees above, on stipulation, is fully confirmed, as will presently be seen, by that of other witnesses who were sworn in the cause in behalf of the receiver, and closely cross-examined.

The practical effect of such evidence is to strongly and conclusively establish an agreement between the consignees, either as owners, or as agents of the owners, and the Terminal Association by which the latter was to act as warehouseman, in taking and storing the goods of the former upon their arrival and deposit on the tracks of the latter at East St Louis.

The reasonable presumption that also arises upon the face of such evidence is that the duty of the receiver as a common carrier had been fully performed when the cars and their contents had been hauled to the end of the receiver's rails and set to the designate "Y" track of the Terminal Association at East St. Louis.

Such evidence also shows the motive and consideration influencing the Terminal Association to store the cars on its tracks at East St. Louis, without charge, *to be the control of the transportation*, upon

reassignment to its fresh destination, either to the owners across the river in St. Louis, or the various owners on the east side of the river.

(c) **The carrier was not required in the usual course of business, nor expected, to remove the freight from the cars.**

The evidence on this point is clear that it was the custom established by these very consignees to permit these barley shipments to stand in the yards of the Terminal Association at East St. Louis from two (2) hours to four (4) weeks or more. The reason for this was plain. The consignees were brokers, they were not consumers. They acquired the grain to resell. If the grain arrived before they had made a re sale, or if the "market" did not suit them, it was necessary to store it some place, and by arrangement with the Terminal Association the place of storage was designated as their tracks in East St Louis. It would have been not only inconvenient to remove the grain from the cars, but would have also caused great and unnecessary expense and delay, inasmuch as they themselves had no perfect control over the date of reshipping the barley, as that depended on the state of the "market." So it was greatly to their advantage to keep the grain in the cars ready to receive a fresh destination at the very moment they could make a sale. The evidence which establishes this custom, and which is uncontroverted, is found in the testimony of W. H.

Calvert, the agent of the Receiver at East St. Louis, which we quote (R. p. 252), and which shows that this custom has existed since the winter or early spring of 1891.

> Q. "You stated yesterday in the course of your examination as to these barley shipments coming to us over the Chicago, Milwaukee & St. Paul Railway, and probably as to certain other classes of property, the shipments in question were permitted to stand in the yard at East St. Louis, all the way from two hours up to four weeks or more; I will ask you to explain how this happened.
>
> A. "Well, the class of freight allowed to stand there consists of grain, (barley in particular) hard coal, pig iron and salt, and other commodities that are held on what we term the market; in other words, forwarded there (not in all cases, but as a rule) and held for the accommodation of the consignee, which is virtually for the interest of the shipper; the barley being held on commission to await an advance in the market. In other words, it comes in there, and if the market is all right when it arrives they sell it immediately, but as a rule hold it until the market suits them. It is, in other words, a port of entry for that class of goods at St. Louis.
>
> Q. "And is held to await the state of the market for the accommodation of the consignee?
>
> A. "For the accommodation of the consignee, which is virtually accommodation to the owner, it being handled on commission.
>
> Q. "How long has this barley business been carried on, and how long had that custom of shipment been in operation at St. Louis?
>
> A. "Well, since the C., P. & St. L. opened business in East St. Louis, which was in the winter or early December or January, 1891."

We also refer to the testimony of the same witnesses at R. p. 228, 229.

In further corroboration we quote also from the testimony of E. R. Stapleton, Chief Clerk of Calvert, at pages 204 and 205 of the record, as follows: (R. p. 204)

Q. "Do you mean to say that the receiver had control of these cars so far as placing them is concerned, or handling them?

A. So far as placing them or handling them he did not.

Q. Now, I will ask you whether cars billed, say from Wykoff, wherever that may be, to East St. Louis, with a memorandum on the face of the way-bill which stated the name of the consignee in St. Louis, whether the C., P. & St. L., when it delivered the cars at these yards in East St. Louis, had hauled them as far as they contracted to haul them?

(Objection.)

A. They had. The destination of St. Louis on the bill cuts no figure in the matter whatever; the cars are brought in there and held, and the consignee is served with a regular notice.

Q. Then it is the consignee directs?

A. The consignee directs where he wants them: a large portion go to Belleville or Highland or Hines Brewery—to different places.

Q. I will ask you whether or not the way-bill as to barley shipped on which you had had the name of the consignee in St. Louis was conclusive as to the ultimate destination of the car?

A. The barley shipment? By no means whatever.

Q. What became of it after placing it on the "Y"?

A. It would be hard to answer that question, because it goes to a thousand different places.

Mr. Hanson: In St. Louis?

A. St. Louis and East St. Louis both; no general place.

Q. Is this barley, any of the barley received from the C., M. & St. P. prior to the date of the fire, and about which he has offered some memorandum way-bills and so forth shipped to other points—East St. Louis?

A. Prior to the fire?

Q. I speak of prior to the fire.

A. Oh, yes.

Q. Who controlled as to the precise and definite point where it should be delivered?

A. The consignee in all cases.

Q. Then I will ask you what the custom was as between the C., P. & St. L. and the Terminal Railroad Association as to the further direction and final destination of the cars.

A. The cars would come in and be placed on the tracks in the Terminal Association yard wherever they saw fit; we would take the way-bill and notify the consignee that we had a car numbered so and so and loaded barley, "where do you want it?" That is about the substance of the notice. And at such time as he got ready he would send this notice back, endorsed on the back a great many times, send this car to Hines' Brewery or send it to Highland or some other point. Then we take and make out a way-bill; take that to Mr. Phelps and take his receipt.

Q. Was that a different and separate transaction having reference to the original contract between the shipper and the C., M. & St. P.; was it a new arrangement the consignee directed and controlled, or was it the original arrangement named by the shipper?

A. A new arrangement by the consignee, who placed orders with us to hold his barley."

Also the Receiver, C. H. Bosworth: (R p. 241.)

Q. "As Receiver, I will ask you to state between what points you undertook to haul that barley, and between what points you were paid?

A. "Peoria and East St. Louis.

Q. "What point in East St. Louis?

A. "It is difficult for me to state that. I should say in answer to that question that we can't haul it further than the end of our rails.

Q. "Where is the end of your rails?

A. "At the bridge junction, unless the stuff was expected to be delivered at our freight house or the yard tracks in connection, when it would be delivered to the Terminal Association.

Q. "I refer you to a certain blue print offered on behalf of the petitioners, and call your attention to three certain 'Y' tracks, upon which it appears from the statement of Mr. Calvert, Mr. Phelps and others, these C., M. & St. P. and other cars hauled by you to East St. Louis were delivered, and ask you whether or not you exercised any right of control as a common carrier beyond these three 'Ys?'

A. "That is the place where all of our deliveries were made to the Terminal Association, our engine would pull the train into those 'Ys' and their switch engine would take it from there.

Q. "Who had the care, custody and control after you delivered them on these three 'Ys'?

A. "The St. Louis Terminal Association, unquestionably.

Mr. Hanson: That is, that is your legal opinion?

A. "No; they actually had the cars and custody of the cars; we had no agents to attend to the movement of them, or no engines.

A. "What did the bills of lading say? (R p. 249.)

Q. "From Wykoff to East St. Louis with the name of the consignee in St. Louis.

A. "I should say that without any special understanding or knowledge about the business, our agent would have naturally taken the cars or had them eventually brought on the transfer tracks, which would be near our freight house in East St. Louis. It was known in all these cases the cars were subject to movement by rail by some railroad company and put in this yard convenient for that additional movement.

Q. "Was that separate and distinct, or was it a part of the original contract by which you undertook the freight?

A. "I should say not a part of the original contract; the contract provided for transportation to East St. Louis. We had fulfilled that part of it, and we had discharged our obligation."

Also Henry Rippe, one of the interveners: (R. p. 331.)

Q. "Upon receipt of this letter did you instruct your agent not to allow the shipments to be held in East St. Louis?

A. "I do not think I did.

Q. "What did you do upon receipt of the notice contained in this to-wit: 'All your shipments come via J., S. E. R. R. into East St. Louis, and are held there until disposition is given them, and they pay the transfer,' in regard to instructing your agent?

A. "I don't think I wrote them anything; I left it to their mode of doing business; I could not tell them what to do down there.

Q. "You allowed them to handle that end of the business?

"Yes, sir."

(d) No particular place of delivery was designated by the contract of carriage.

This must be conceded in any view that is taken of this case. It makes no difference whether the destination was St. Louis or East St. Louis. There is nothing in the way-bills to indicate what place in St. Louis or East St. Louis delivery was to be made. By the way-bills the freight was to be forwarded from a certain point to East St. Louis, and the name of

the consignee and his residence, "St. Louis, Mo.," was also noted therein. The only other evidence of the contract of carriage is the delivery of the goods to the carrier, and the shipping receipt. which were given to the shippers after the loss occurred. As to place of destination, the shippers' receipt will be found as indefinite as the way-bills, as they name only the consignee and the city in which he resides. without anything as to the particular point in the city where the goods are to be delivered.

There is nothing surprising in this. The absence of a designated place of delivery in the contract of carriage is not the result of negligence or mistake, but from the very nature of the shipments it was the intention of the parties not to designate a place of delivery. The consignees were grain brokers. Their business was buying and selling, not consuming. It would not be reasonable. therefore, to presume that it was the intention of the parties to have bulk barley delivered at the place of business of the consignees. Especially in view of the fact, fully disclosed in the evidence, that the consignee, after resale, and as necessary, directed reshipment and delivery to Hine's brewery, East St. Louis, or to Highland, or to Belleville, Illinois, or to the St Louis breweries, for all of which places East St. Louis was the designated "port of entry."

(e) Not only in the usual course of business, but also by special arrangement, the cars and their contents were placed on the tracks of the Terminal Railroad Association for the convenience of the consignees.

That there was in fact an arrangement between the Terminal Railroad Association and the consignees to hold this grain in the cars on the tracks of the Terminal Railroad Association at East St. Louis, we have shown above by a reference to the stipulation of facts entered into and of record. And that these cars and their contents were held on the tracks of the Terminal Railroad Association for the convenience of the consignees, we have shown by a reference to the uncontradicted evidence of W. H. Calvert, his chief clerk Stapleton, and by the letter of Orthwein to Rippe, Exhibit "G" (R. p. 334).

In the Court of Appeals, opposing counsel did not deny the existence of this agreement, but after having stipulated that the consignees would swear to it, sought to annul its effect by argument. They presented "three complete answers" to it. (Appellee's Brief, p. 23.)

> 1. "This barley was all consigned to either the Teichman Commission Company, St. Louis, or the Orthwein Grain Company, St. Louis, by way of East St. Louis. This is made certain by the stipulation between the parties of August 27, 1895 hereinbefore referred to; and had the witnesses been present and testified as stated by

> the counsel, their testimony would not have changed the effect of this stipulation, as to the destination of the barley."

We submit that the testimony of these witnesses does not change the effect of the stipulation referred to, as there is a radical difference between the person to whom a shipment may be "*consigned*" and the place to which it is *destined*. But if it be admitted that the original destination was St Louis, these witnesses were the consignees and *had the right to change the destination to East St. Louis.*

The second complete answer was:

> 2. "The consignees of the barley in question had no authority to bind the shippers, who were the owners, to any such arrangement."

This is a statement of law for which no authority is cited, nor can any be found. On the contrary, the law is well settled that the consignees had the undoubted authority to make the arrangement by which the destination was changed to East St. Louis, and the cars there held for a fresh contract of carriage.

(This brief *ante* p. 28 for authorities.)

Not only in this second answer without foundation in law, but it is also utterly without foundation in fact, as will appear from the testimony of one of the shippers, Mr. Rippe, from which it appears that the method of handling this barley business at East St. Louis was left entirely to the consignees.

"Q. What did you do upon receipt of the notice contained in this letter, to-wit: 'all your shipments come via J. S. E. R'd into *East St. Louis*, and are *held there until disposition is given them*, and they pay the transfer,' in regard to instructing your agent? (The Orthwein Grain Company.)

A. I don't think I wrote them anything: *I left it to their mode of doing business. I could not tell them what to do down there.*

Q. You allowed them to handle that end of the business?

A. Yes, sir." (R. p. 331.)

The third "complete answer" of opposing counsel was so complete that it answered itself. They argued that:

"until there had been a delivery * * * to the Terminal, it could not hold possession of it for the consignees. This is made clear from the testimony of Mr. Stapleton * * from which it appears that the custom was for him to notify the consignees of the arrival of the barley and ask them where they wanted it, *and upon* receiving this information, he would then make out a way-bill, deliver it to the agent of the Terminal and take his receipt."

It is well settled, however, that a carrier is under no obligation to notify a consignee of the arrival of the goods, and if the consignee does not appear to accept them the carrier may place them in storage at the consignee's expense and risk. With this in view, the question naturally arises, what was done with the goods between their arrival at East St. Louis and the

issuing of the new way-bill upon the order of the consignee. The reply is found in opposing counsel's "third complete answer," where they stated that:

> "until the consignees knew that the barley had arrived at East St. Louis, and the same had been delivered to the Terminal Association, they could not and would not give that company further orders for re-shipment."

Thus showing conclusively that even opposing counsel recognize that it was customary to ***make a delivery*** to the Terminal, and *after* such delivery had been made for storage, to notify the consignees, and then take their instructions for a ***new contract of carriage*** to a ***fresh destination.*** Is it not a little significant that these instructions ***were often sent direct to the Terminal?*** (R. pp. 207-208.)

Did these notices then amount to anything more than advising the consignees that their barley was in storage with the Terminal, awaiting their convenience for a sale and fresh destination? Was the receiver under any legal obligation as a common carrier, to send them? Surely not. The sending of these notices did not deliver the cars, and if the cars had actually been delivered, the *Terminal Railroad should not be permitted to escape liability for their care*, simply because the receiver had not continued to advise the consignees that their goods were where they had arranged to store them. However, the testimony shows that it was the custom to notify these con-

signees. (R. p. 204-5) and the presumption follows that they were notified. If they had not been, opposing counsel would have had them so testify.

(f) Petitioners abandon the position assumed in the lower courts.

Abandoning the argument by which they attempted, in the lower courts, to nullify this agreement between the consignees and the Terminal, they now take a new position, viz: that at the time the testimony was admitted they

> "had no thought, and not until it was argued in opposing counsel's brief on these appeals *did it ever occur to us*, that it could or would be *contended* that this informal stipulation, made in the hurry of and for the purpose of expediting a hearing, would or could be construed in such a manner as to cover the cars while they were yet standing and being held on tracks used by the receiver, under his agreement with that association." (Brief p. 21.)

If this agreement did not apply to the cars when they were burned, it surely would have been irrelevant and immaterial. But opposing counsel made absolutely no objection to its introduction on these or any other grounds.

For what purpose did opposing counsel think this agreement was introduced, if not for the purpose of "contending" that it covered these cars, *since they were the only cars in controversy?* We can see how the agreement might have been a shock and surprise to counsel when they came to give it mature considera

tion, but we do not see how it can avail them to say that they did not realize the purpose for which it was introduced, nor how they can thus avoid its effect.

(g) The agreement is an established fact.

In support of the petition for certiorari, it is attempted to belittle this testimony by referring to it as "the statement which counsel made" and as the statement of what counsel "expected to prove by certain witnesses," with the accent on the word "*expected.*" The existence of this agreement is an *established fact.* Opposing counsel admitted it in evidence without objection, and did not attempt to rebut it. We submit that it does not now become them to use language insinuating it to be a fiction. We had the promise of the consignees that they would attend and so testify; we relied on their attendance. They were outside the jurisdiction of the court and could not be compelled to attend. Not until the day before the hearing did these consignees inform our St. Louis agent that, *at the request of counsel for the Terminal Association,* they would not *voluntarily* testify.

We would have compelled them to testify (by deposition) if opposing counsel had not admitted our statement of what we "expected" to prove by them. It may be that counsel thought a ready admission on their part would make the testimony less effective than it would be were they to fight it stubbornly by

cross-examination with no hopes of breaking it down, or denying it on rebuttal. In fact, they did succeed in making the master overlook it entirely. But that did not take it out of the record.

(h) When new way-bills were issued time for storage had passed.

Opposing counsel argue that the testimony shows that the consignees had an agreement with *both* the receiver and the Terminal for holding barley at East St. Louis. This argument is well answered by his Honor, Judge Woods, where in his opinion he says: (R. p. 381.)

> "Whether the receiver, either in ignorance of the agreement of the Association with the consignees, or for other reasons growing out of the custom of business between the two companies, supposed himself to be in some sense responsible for the consignment in question, *is not material.* * * * *To a consignee who has provided a place for the receipt and storage of his goods, a carrier is certainly under no obligation to afford like facilities.*"

But opposing counsel say that the existence of these two agreements to hold the barley for the consignee should be reconciled in this manner, namely: (Brief, p. 26.)

> "that the arrangement which the consignee had with the receiver * * * was intended to apply while it was standing on the tracks which the receiver used between the *time of its arrival* at East St. Louis, and the *time when it was way-billed* over to the Terminal; and that the arrangement they had with the Terminal * * * applied to the cars of barley after they had come into the possession of that Association in the usual and customary way by the *delivery of way bills* * * * or

> to cars which the receiver could not hold on his tracks by reason of the limited space which he had contracted for being fully occupied * * * * ."

Reconciliation in this manner fails by reason of the fact that *after* the consignees gave instructions for a new way-bill *there was no storage necessary;* the cars immediately began a new transit. The storage, to be of any benefit to the consignees, was from the time the barley arrived in East St. Louis and was set on the tracks of the Terminal until the grain was sold and a new way-bill made out. *This was absolutely the only storage that could have been contemplated.* No cars were ever held in storage *after* the new way-bill was made out; *the way-bill itself started the cars on the new transit.*

The arrangement for storage could not apply to "cars which the receiver could not hold on his tracks by reason of the limited space, etc," since from opposing counsel's own view of this case, the receiver had tracks for one hundred and fifty cars, and at the time of the fire there were only seventy cars there. If such agreement is to be construed as applying to cars which the receiver *could not* put upon these tracks, then the agreement did not apply to any cars that were burned since such cars *were on these tracks*, and only seventy in number.

The evidence, however, is not conflicting. The "arrangement" which is referred to in the testimony of

the receiver's witnesses is the word used to distinguish between the original contract of shipment, and the action on the part of consignee in changing the destination. The word "hold," used by the witnesses, can only be construed as *arresting* the original transit of the barley at East St. Louis.

Therefore, instead of there being evidence of two arrangements with the consignee to "hold the barley in storage"—one by the receiver and one by the Terminal—the evidence is of (1) a *custom* on the part of the receiver to arrest the course of the original transit at East St. Louis, and of (2) an *agreement* between the consignees and the Terminal, whereby the latter was to *store* the barley *after* its transit had been *arrested.*

The *custom* is the result of the exercise by the consignees of their right to change the destination of shipments. The *agreement* provided for the care of the shipments from the time they were arrested until the consignees determined the new destination, which was when the barley was resold. The custom and agreement do not conflict and need no strained reconciliation, but one follows the other in natural sequence.

III.

If the Agreement to store the cars was between the Receiver and the Consignees, then the Receiver is not liable.

If we admit the strenuous contention of the petitioners, *here made for the first time in this litigation,* that the agreement to hold this barley in storage at East St. Louis was between the receiver and the consignees, even then the receiver is not liable for its loss. If this is so, the court can then deny this application for certiorari on the well settled principle, that if a decree is right, it can not be reversed simply because the reasoning assigned by the lower court is not sound.

(a) Such an agreement would at most make the receiver a warehouseman.

The question thereupon arises—when does the liability of a railroad as a common carrier cease, and when does the liability of a warehouseman attach? To answer the question and and to sustain the above deductions, we refer to the case of *Gregg vs. Illinois Central Railroad Company, 147 Ill., 550,* and quote the following from the opinion of the court delivered by Mr. Justice Shope:

> "The law is well settled in this state that the liability of a railroad company as a common carrier of

> freight, ceases upon the unloading of the goods from the car at the place of destination, and placing them in a safe and secure warehouse; *or, where the carrier is not required, in the usual course of business, or expected, to remove the freight from the car, as in the case of grain in bulk, coal, lumber and the like, by delivering the cars in a safe and convenient position for unloading at the elevator, warehouse or other place designated by the contract or required in the usual course of business; or, if no place of delivery is thus designated or required, on its side track, in the usual and customary place for unloading by consignees.*"

In support of the foregoing, the Supreme Court of Illinois in that case cited with approval many cases In stating the above doctrine it says:

> "In all such cases the question to be determined is whether anything remains to be done by the carrier in completion of its contract to safely carry and deliver the goods at the place of destination. If there is, its liability as a common carrier continues; if there is not, and the goods remain in the possession of the carrier, its liability in respect thereto, when not varied by contract or usage, is as a warehouseman only."

Let us apply that well accepted test to the facts in the case at bar. Did anything remain to be done by the receiver of the Chicago, Peoria & St. Louis Railway Company in completion of his contract to transport the cars and their contents from Pekin, Illinois, and safely carry to, and deliver them at East St. Louis. We contend that in the handling of this class of business the lines were well established in two ways: First, by the ordinary and usual course of business, which had been in existence for three years; and, second, by the express arrangement between

consignees and (admitting for the sake of argument) the Receiver; and the lines so established were that the receiver was to haul the cars and contents from Pekin to the end of his rails in East St. Louis, and there place them on certain designated "Ys" in a position to be attached to by an engine of the Terminal Association, which engine was to haul them in, break up the train and deposit the cars on tracks of its own, where they were to await a fresh destination from the consignee. This, the uncontroverted evidence shows, was faithfully done. We have fairly and fully met the rule in the *Gregg case*, and shown that the receiver was "not required in the usual course of business or expected to remove the freight from the cars," and that the receiver did safely deliver the cars at the "place required in the usual course of business."

(b) In the performance of the original contract, nothing remained to be done by the Receiver.

In the application of this test below, it was argued by opposing counsel that one act remained to be performed by the receiver, and that was, he should deliver to the Terminal Railroad Association new way-bills or manifest showing fresh destination of the cars. In reply to this our contention then was, and now is, that such new way-bill was the creation of a new contract of carriage, and not the

performance of any act of the original contract of carriage. The relations of the receiver to such new contract might be those of agent, in that behalf, for the consignee or consignor, but not those of a carrier.

It was also contended that, after the receiver set the cars in question, on the "Ys" of the Terminal Association at East St. Louis, there remained the further duty of notifying the consignee of the arrival of the goods. But that contention is met by: (1) the decisions of the Supreme Court of Illinois, beginning with *Railroad Company vs. Scott, 42 Ill., 139*, which hold that a carrier is under no such duty; and, (2) by the *presumption* that such notices were sent, which follows from the evidence of the *custom* so to do.

It may also be contended that there remained for the receiver to obtain the direction of the consignee as to where the consignee desired the cars to be finally sent. The reply to this is again, that such directions came only after the original consignee had sold the goods in question to a third party, either by private sale or on the Board at St. Louis, and when such direction did come *it was the beginning of a new contract of carriage;* the goods became the subject of a reshipment, the consignee became another person, and the destination was altered accordingly.

Thus, all the acts of the receiver in connection with the barley or cars containing it, after they had been set to the tracks of the Terminal Railroad Asso-

ciation at East St. Louis, were acts, not performed in the execution of the original contract of carriage from the shipper to the commission broker, but were incident to a new and distinct contract of carriage from East St. Louis to the destination indicated by the consignee, and in which the consignee of the original contract became the consignor, and the purchaser became the consignee. That the duty of the receiver in that behalf was simply the transmission by him of the instruction of the original consignee to the Terminal Association, is clearly shown by the following evidence of the witness Calvert (R. p. 234):

> Q. "I omitted to ask you as to these cars coming to the C. P. & St. L. from the C. M. & St. P., how long, as a rule, the consignees left them there.
>
> Objection. Incompetent, immaterial, irrelevant, not in the issue.
>
> A. That is a pretty hard matter for me to give an intelligent answer on.
>
> Q. Shortest and longest time?
>
> A. There is a great many of the cars we have orders for before they arrive, giving us designated points for their delivery. Then there is a great many of them we do not get orders on for some time. Furthermore there is one or two of the firms there that place an order at the beginning of the season to give either the Wiggins Ferry Company or the Terminal Railroad Association all their business, which is then held by the Terminal Association or the Wiggins Ferry Company, and forwarded on to the destination by orders direct from the consignee—either the Wiggins Ferry Company or the Terminal Association. I should judge the average of that barley business would be, well, I will say a week. That is simply my guess.

Q. Give the shortest time and the longest time, then the average in your opinion.

A. Some of them would stay there for thirty days; and then some would go right through without stopping.

Q. Dependent on?

A. Dependent on the condition of the market, and the market was governed altogether by the condition of the weather. During the warm weather they wouldn't unload; if we got a cold spell we would get a rush on barley; warm, slack up.

Q. After cars arrive you put them at the designated place of deposit on these Y's, by means of your engines. I will ask you whether or not you proceeded to take the direction of the consignee pursuant to the way-bill that accompanied the car, as a new matter outside of the way bill and for the convenience of the consignee?

A. New matter altogether. All barley business handled under special instructions issued by the consignees of the shippers. Fresh way-bills to use; not so all of it; some, where it was billed directly through, of course, not stopping; didn't ask the consignees for the disposition of that, but that is only to a brewery, for instance, that may know just how much they want to use, and have it billed that way; but (as to) all the other firms, go and get special orders from the consignees."

Cross-Examined.

Q. Then with such a bill marked Teichman Commission Company, St. Louis, Mo., before you refer the matter to the agent at Wycoff, where the shipment started, you will find out where the Teichman Commission Company was, and where you could make delivery of the cars?

A. Yes, sir.

Q. This testimony you have been giving with reference to custom applies generally to shipments of barley?

A. Yes, sir; so far as the C., P. & St. L. is concerned. Can't answer as to the custom on other roads.

Re-Direct

Q. I will ask you, would you have undertaken to send this car to St. Louis if you didn't get the direction?

A. No, sir; because I would have had no guide.

Q. East St. Louis was the destination?

A. Yes, sir; until we received orders from the consignee as to the final disposition.

Re-Cross.

Q. You would seek out information to enable you to make delivery of the contents of that car?

A. Yes, sir.

Q. Taking this way-bill as a starter to find out?

A. Yes, sir.

Q. The only means you had?

A. The only means I had of learning to whom I should go for the order.

Re-Direct.

Q. "It is suggested by the receiver, who is present, and I will ask you if it is not and was not the ordinary way of billing these cars, to bill them to East St. Louis and then leave the consignee to direct you as to how or by what route they were to be shipped further to the final point of disposition?

A. "That is the custom of billing on lines entering East St. Louis."

Upon the above evidence, supported also by that of Stapleton, the receiver, and the consignees, we submit this fair conclusion:

The acts of the receiver subsequent to placing the cars at the "Y's" of the Terminal Association at East St. Louis, were not acts performed in connection with

the execution of the original contract of carriage, and therefore can not be said to be acts which remained to be done by the carrier in relation to such original contract.

In *Railroad vs. Montgomery, 39 Ill., 335*, it appeared that hay was placed on cars one Friday; on the next morning the conductor of the freight train was about to take it away, when the consignor said he did not wish it to go until he could see the person to whom he had sold it. The cars were left, and on the next day the hay was destroyed by fire from a passing locomotive. On this state of facts, the court said: (p. 337.)

> "the technical liability of a common carrier does not attach until the delivery to him of the property is complete. If, for example, the same person is common carrier and warehouseman, and he receives goods to be forwarded when he has orders from the owner, his liability in the meantime is that of a warehouseman, and not that of a common carrier."

This principle is well established.

Cairns vs. Robbins, 8 M. & W., 258.

Pittsburgh vs. Barrett, 3 Am. & Eng. R. R. Cases, 256.

Michigan R. R. vs. Northern R. R., 7 Mich., 515.

O'Neil vs. N. Y. Cent., 60 N. Y., 138.

Barron vs. Eldredge, 100 Mass., 455.

Nichols vs. Smith, 115 Mass., 332.

Hutchinson on Carriers, § 82.

Angell on Carriers, § 134 and note.

This principle is also forcibly illustrated and applied by the Supreme Court of the United States in *St. Louis R. R. vs. Knight, 122 U. S., 79.* There it appeared that one Potter was a cotton broker at Texarkana; that he bought most of his cotton at points in Texas, on railroads running into Texarkana; that it was brought to Texarkana on the railroads, and delivered on the platform of a compress company, to be compressed before being reshipped north and east; after arrival on the platform it was weighed, classed and marked by Potter, after which *the railway company* was to compress it before shipping north, and pay for the compressing; after being compressed it was set out on the loading platform, and was then shipped to such consignees as Potter directed; when the superintendent of the compress certified that cotton had been delivered for compress, the railway company issued bills of lading therefor to Potter. The cotton accumulated faster than it could be compressed and shipped.

In that case it was held that the liability as a carrier did not attach until Potter had designated the consignees, although bills of lading had already been issued by the railway company. The court says:

> "It may be said that the defendant's liability as a common carrier commenced at a time antecedent to the delivery of the cotton to be loaded on the cars; that it might have arisen on a prior delivery of the cotton in question in the warehouse to be compressed, and then transported, *the duty of compressing it, in order to prepare it for transportation, having been undertaken by the defendant,*

> This, however, could only be when the specific goods, as the property of the plaintiffs, were delivered for that purpose into the exclusive possession and control of the defendant. Such was not the case in the present instance. No specific bales as the property of the plaintiffs, separate from all others, were delivered to the defendant for them *until the 525 bales in controversy were set apart and delivered to the defendant for immediate transportation on its cars;* and prior to that time all cotton received in its warehouse to be compressed, was received as the property of Potter, on his account, and subject, so far as grading, classifying and marking were concerned, to his control, *and none of it could be considered as having passed into the possession of the defendant as a common carrier* for transportation until designated and set apart by Potter or his agents."

In the case at bar, the cars and contents were awaiting a fresh destination, which could only be ascertained after the consignees had sold the barley and indicated who the new consignee was to be. Until these acts had been performed by the consignees, *whoever* held the cars and contents, held them simply as warehouseman.

But in the *Knight case* we find further facts which bring the two cases even closer together, if possible. The court there continues:

> "The cotton received at the company's warehouse came consigned to Potter upon bills of lading issued by other railroad and transportation companies at the point of shipment for delivery to him at Texarkana. Supposing, as one view of the evidence authorizes, the bills of lading were issued by the agents of the defendant to Potter in advance of the actual delivery of the cotton in the warehouse, on the faith of the bills of lading produced and surrendered by him, given by other carriers; still, the cotton as it came and accumulated in the warehouse for the purpose of being compressed, continued to be the property of Potter, subject to his control in the

respects already mentioned; and until specific lots were marked and designated, so as to correspond with the bills of lading previously issued by the defendant, *the latter had no possession of the property as a carrier.*"

It is because there remained something to be done by the consignees, before the cars could be moved from East St. Louis, where they were deposited on their arrival, that we submit, no matter who had possession, *such possession was not that of a carrier.*

(c) Where the consignees are accustomed to use the warehouse of the carrier, the transit ends when the goods arrive.

The principle is also well established that where the consignee, having no warehouse of his own, is accustomed so to employ that of the carrier, the transit ends when the goods arrive and are set at the usual place of storing, even though they immediately received a fresh destination.

In *Foster vs. Frampton*, 6 *B. & C.*, 107, where goods are to be delivered to the vendee at a particular place, the transitus in general continues until they are delivered to him at that place. But if he, by his own act, prevent the delivery, which otherwise in the ordinary course of business would take place, and does any act equivalent to taking possession, the transitus is thereby terminated. And, therefore, where the vendee of several hogsheads of sugar, upon receiving from the carrier notice of their arrival, took samples

from them for his own convenience, and desired the carrier to let them remain in his warehouse until he should receive further directions, and before they were removed, the vendee became bankrupt, it was held that the transitus was at an end.

This principle is well illustrated in cases involving the right of *stoppage in transitu*, since it is well established that such a right does not exist unless the goods are still in transit and have not been delivered to the consignee.

In *Scott vs. Pettit, 3 Bosanquet & Pullier, 469*, it appeared that on the 16th day of March, goods were forwarded from Manchester addressed to A, at the Bull Inn, London, in consequence of a previous order from him. On the 23d of the same month the goods were sent to the defendant's house, as the packer of A, the latter having given no direction at the Bull Inn respecting these particulars goods, but having given a general order that all goods addressed to him should be sent to the defendant, A having no warehouse of his own. On the 11th day of March, A committed an act of bankruptcy. When the goods arrived at the defendants, they were booked to the account of A, and the defendant not knowing of A's bankruptcy, unpacked the goods to ascertain their contents. On the 31st day of March, the goods were claimed by the consignors, and on the day after by the assignees of A, against whom the commission had been taken out.

The consignors claimed the right of *stoppage in transitu*, to support which it was necessary to show that the goods had not been delivered to the consignee. The court, however, held that the *transitus* of the the goods was at an end when they arrived at the defendant's house; and consequently, that the consignor's right of *stoppage in transitu* did not exist, and that the plaintiffs, as assignees of of A. were entitled to recover them in an action of trover. The court said, p. 472:

> "In this case it seems to me impossible to raise a doubt, whether the transit was at an end or not: for if the bankrupt had no warehouse to receive the goods, but that of the packer, the transit never could be at an end, if it did not end there. * * * * *
>
> If the bankrupt in this case had possessed a warehouse of his own, and the packer had merely taken them as a middle man, the consignors might have stopped them. But there being no other place of delivery but the warehouses of the packer, the goods when received there had gone to their last place of delivery, and consequently were no longer subject to the right of *stoppage in transitu*. * * *
>
> If the warehouse of the packer was not to be considered as the place of delivery of the bankrupt in the case, there could be no place of delivery at all, for the bankrupt had no other opportunity of receiving the goods but by the hands of defendant." (p. 473.)

Another case in which the same question is presented, is that of *Rowe vs. Pitford, 8 Taunton, 83*. There it appeared that a trader in London was in the habit of purchasing goods at Manchester and exporting them to the Continent soon after their arrival in London. The goods so consigned to him remained in

the wagon office of the defendants, who were carriers, until they were removed by his agent for the purpose of being shipped. The consignments of goods for the trader was delivered to the defendants on the 9th and 12th of August; on the 14th and 17th inst. the goods arrived at the wagon office of the defendants, on the 16th or 17th inst. the trader became bankrupt, and, on the 19th inst., notice of non-delivery to the bankrupt was given by the consignor to the defendants, who, according to order, delivered the goods, on the 21st, to a third house. The assignees of the bankrupt, the consignees, brought an action to recover the goods, and it was there held that they were entitled to the same, and that the right of the consignor to ***stoppage in transitu*** ceased on the arrival of the goods at the wagon office of the defendants in London. In support of the conclusion there arrived at, the court said, p. 85:

> "In *Richardson vs. Goss*, 3 *B. & P.* 127) *Chambre, J.*, said that he was strongly inclined to think, that, if a man be in the habit of using the warehouse of a wharfinger as his own, and make it the repository of his goods, and dispose of them there, the journey would be at an end when the goods arrived at such warehouse; and, in *Scott vs. Pettit*, 3 *B. & P.* 472) *Lord Alvanley* said, he perfectly coincided with *Mr Justice Chambre* in that which he had intimated in the former case. Both these cases were recognized in *Dickson vs. Baldwin*, (2 *B. & P.* 578) and there were confirmed by *Lord Ellenborough*."

In *Allen vs. Gripper*, 2 *Compton & Jervis*, 218, this principle is applied to a state of facts ***strikingly similar*** to that in the case at bar.

Lord Lyndhurst, C. B., says: (p. 220)

"The facts of the case are shortly these: Pestall had been in the habit of employing defendants for several years: and the course of dealing appeared to be, that the oil cakes were carried to Hertford, in the defendant's barge, and deposited in the defendant's warehouse, generally, for many months. * * * * * There was also evidence to show that they were so deposited *for the convenience of Pestall, that they might be distributed to his customers*, many of whom resided in the neighborhood. * * * * On this state of facts it appears to me, that the *transitus* was at an end."

On the same question *Bailey, B.*, says: (220)

"It appears by the evidence that the defendant's warehouse was the place at which these goods were to stop, and that the warehouse was to be considered, for the purpose of depositing these cakes, as the warehouse of Pestall, the purchaser. *The goods were not to be forwarded to Baldock* (where Pestall carried on his business) *without fresh orders; and they were to go*, according to the evidence in the cause, *to Baldock, or the customers of Pestall, as he should direct*. He thus had the complete power of giving a new destination to the goods, *and when they arrived at the place where they were to await such fresh destination*, the *destination* contemplated by the plaintiffs and Pestall *was at an end*."

(d) By arrangement the consignees used the tracks of the Terminal Association for warehouse purposes.

In support of the above we refer again to the stipulation as to the evidence of the consignees, and the testimony of W. H. Calvert, found at page 252 in which he says:

"Well, the class of freight allowed to stand there consists of grain, barley in particular, hard coal, pig iron and salt, and other commodities that are held on what we

> term the market: in other words, forwarded there (not in all cases, but as a rule) and held for the accommodation of the consignees, which is virtually for the interest of the shipper: the barley being held on commission to await an advance in the market: in other words, it comes in there, and if the market is all right when it arrives, they sell it immediately, but as a rule, hold it until the market suits them."

The above evidence stands uncontradicted. From it there is but one logical deduction, and that is that the barley was held on the tracks of the Terminal Railroad Association, in their yards at East St. Louis, free of storage for the convenience of, and for the purpose of giving the consignees an opportunity to sell the same, when they thought the market had reached its highest point, and after selling the same, to re-consign it in the same cars to the purchasers.

The moment the Terminal had attached its engines to these cars, *there was a physical delivery of the cars and contents to it*, to hold the same awaiting further instructions, *not from the receiver for a continuance of the original contract of carriage, but from consignees for a fresh destination and new contract of carriage.* If the agreement to hold them there was with the receiver, he held them as a warehouseman only.

(e) **Being sued as a carrier recovery can not be had as a warehouseman.**

The allegations are specific that the property was in transit. If this is so, the liability charged is that of a carrier, and to recover under such an allegation

the proof must show a breach of a common carrier's duty. We quote from one of the petitions, all of which are the same as to the liability alleged: (R. p. 25.)

> "there delivered to the Chicago, Peoria & St. Louis Railway Company, to be *transported* by it to destination; that the said last named company received said two car loads of barley, and *transported* the same as far as East St. Louis, a station on its line, *and while the same were in transit and on their way to destination*, and in the possession and under the control of said last named railway company, the said two cars containing said barley were destroyed by fire * * * * *"

Irrespective of the question in whose possession they were, the evidence is conclusive that they were being held at East St. Louis, subject to the orders of the consignees for a new destination.

It is certainly fundamental that the recovery must be on the liability charged in the pleadings. It would have been impossible to have charged the appellant with the liability of a carrier and warehouseman at the same time, i. e., the time the goods were destroyed; the goods could not have been held both as carrier and warehouseman; it must be one or the other. The selection was made, and cannot now be changed.

In *St. Louis R. R. vs. Knight*, 122 U. S. 79, the defendant was sued as a common carrier, and as in the case at bar, the evidence showing something re-

maining to be done by the shipper, the plaintiffs attempted to fall back on the warehouseman's liability. But the Supreme Court would not permit it, saying:

> "The suggestion in the charge of the Court of a possible ground of liability on the part of the defendant as a warehouseman, *was entirely outside of the issues.* The defendant was not sued upon the ground of any such alleged liability. No facts and circumstances, out of which any duty as a warehouseman could arise, were set out in the declaration; the action was upon the bills of lading alone. The contract alleged to have been made and broken, was contained in them. The duty charged to have been violated was the duty of defendant as a common carrier for an alleged negligence in the transportation of the goods. And if the defendant could be supposed, upon the facts proven, to have incurred liability in its character as a warehouseman, as distinguished from its capacity as a carrier, that liability was not incurred in respect to the plaintiffs. *It is not charged that the defendant, as a warehouseman, received any goods as their property for the purpose of storage and safe keeping.* Its relation as a warehouseman was with Potter, and him alone. *It was an error, therefore,* in the court to charge the jury that the defendant might be charged in this action for the loss in question upon its responsibility as a warehouseman to the plaintiffs."

It may be contended that the amended petitions charge the receiver with the liability of a warehouseman, but this contention cannot be sustained. The amended petition, (R. p. 57) as a premise, *restates* "all the allegations contained in the petition of each one of the foregoing interveners, as hereinbefore made and filed herein," all of which expressly aver that the cars were consigned to St. Louis, Missouri; that the cars were *in transit;* that they were in the possession of the receiver *for transportation; and stating facts which negative the theory that the possession was for storage.*

If the cars were not at their destination, but were in course of *transportation*, the mere fact that *incidental* to a delivery to the next connecting carrier, storage was necessary, *does not change the character from carrier to warehouseman*. This is decided in *Railway Co. vs. Mfg. Co., 16 Wall., 318*. Pleadings must be construed as a whole; by express allegation this amended petition is made a part of the original petitions; and the pleading as a whole must be construed strongly against the pleader.

Therefore, even if the facts set out in the amended petition, are such as aver a storage of these goods, that storage was performed as incidental to the carriage, and the possession was that of a carrier *and not of a warehouseman*. The recovery, therefore, must be as a carrier, and not as a warehouseman.

If the pleadings charge the receiver as a warehouseman, it is for the breach of a duty owing to the consignors. Under the evidence, the duty to warehouse was for the benefit of the consignees; no storage was contemplated in the original contract for the consignors. Therefore, any breach occurring in that respect is to the consignees, and as was said in the *Knight case, supra*:

> "Its relation as a warehouseman was with Potter, *and him alone*. It was error, therefore, in the court to charge the jury that the defendant might be charged in this action for the loss in question upon its responsibility as a warehouseman *to the plaintiffs*."

So we say here, if any relation as a warehouseman existed, it was with the consignees, *and with them alone*, and it would have been error to permit the consignors to recover on the liability of a warehouseman.

(f) The execution of such an agreement would have constituted delivery to the consignees.

If, as contended by opposing counsel, this agreement to store the cars on these particular tracks, was entered into between the receiver and the consignees, it was independent of the original contract of carriage, since there is no common law duty imposed on a carrier to store barley (the destination of which has been changed) for the purpose of permitting the consignees to sell it when the "market" suited them—and was tantamount to the consignees providing for the receipt and storage of such barley. As His Honor, Judge Woods, says in this case: (R. p. 381)

> "Neither is it important, if true, that the Terminal Association undertook to furnish terminal or yard facilities which it was the duty of the receiver's company to provide. If otherwise there would have been such a duty on the receiver, he was relieved of the duy in respect to these cars by force of the agreement between the consignees and the Terminal Association. To a consignee who has provided a place for the receipt and storage of his goods a carrier is certainly under no obligation to afford like facilities; and if by reason of an independent contract the carrier has a right to make delivery or to store goods in the same place provided by the consignee, the carrier does not on that account remain responsible to that consignee for the safety of his goods after depos-

> iting them in that place. These consignees having bargained with the Terminal Association to hold their cars upon its tracks, the tracks became theirs for that purpose, just as much as otherwise they would have been the tracks of the receiver under his agreement with the Terminal Association, and the cars having been placed upon those tracks, the receiver's possession and responsibility ceased, as they would have ceased if the cars had been placed on private tracks of the consignees; and whether way-bills had been handed over or remained in the possession of the receiver could be of no possible significance."

This conclusion of Judge Woods, that the tracks became private tracks of the consignees, follows just as logically irrespective of which railroad the agreement was made with by the consignees, and is in harmony with the rule laid down as to cars in *Railway Co. vs. Railway Co., 123 Ill., 594*, cited at page 37 of opposing counsel's brief.

Let us take opposing counsel on their own argument: They base their right to recovery in these cases on the contention that the agreement of August 1, 1892, between the Terminal Association and the Chicago, Peoria & St. Louis Railway, by which the former was to give the latter certain storage room, acted as a conveyance of the tracks of the Terminal to the Chicago, Peoria & St Louis Railway If this is so, then it follows just as logically that if the receiver entered into an agreement with the consignees, whereby he was to give them certain storage room for their

barley, this also acted as a transfer to them of the tracks, and made those tracks the private tracks of the consignees.

If these were the private tracks of the consignees, then it cannot be questioned but that the placing of the cars thereon by the receiver constituted a delivery to them.

IV.

The cars and contents were delivered to and accepted by the Terminal.

While we admitted above, for the sake of argument, that the agreement for storage was between the receiver and the consignees, *still we insist, as a matter of fact, it was between the consignees and the Terminal.* The question then arises, were these cars delivered to the Terminal?

(a) Pursuant to custom the cars were set to a designated place of deposit.

The record shows beyond any question that the cars were hauled by the receiver to a point on a certain "Y" belonging to the Terminal, where according to the custom existing between the two carriers, the latter sent its own servants with its own engine and took physical possession of the same (R. p. 231). In addition to this, it was the custom of the Terminal to take a record of all such cars deposited on this "Y."

George H. Phelps, local agent of the Terminal at East St. Louis, sworn in behalf of the petitioners, testified as to the exact location of each car at the time of the fire. (R. p. 83)

> Q. "Now you have a list of these cars; will you designate on which tracks these various cars were standing *at the time of the fire*, as near as you can.
>
> A. *I can give you the track each car stood on; they stood on the tracks from 40 to 50, and I can give you the individual car numbers and the tracks they were on.*"

The witness then did so, naming each car and each track (R. pp 83-4-5). This shows a definite knowledge on the part of the Terminal of these cars being on their tracks. How did it come to know that these cars were there if it had nothing to do with them? The fact is they took a record of such cars every day, and even knew what trains of the receiver the cars would come in on (R p 85)

> A. "I can't say what track that was on; that car arrived on train 37, and it was not set on these tracks until after our records were taken, so I am not able to say."

In another place counsel for petitioners asked Mr. Phelps if he had examined the records, and could state when the seventeen cars of the C. M. & St. P. Company, involved in this controversy, arrived at East St. Louis, to which he replied he could, and proceeded to do so. (R. pp. 105-106.)

And this was not the mere personal knowledge of the witness, as appears on cross-examination (R. p. 108), but was obtained from the records of the Terminal.

> Q. "Did you know personally about each of these cars, as to whether they had been, or not, delivered?
>
> A. Consulted the records.
>
> Q. Who made the records?
>
> A. Clerks in our employ."

Again, on cross-examination, this is further established. (R. p. 93.)

> Q. "In designating these tracks in red on the blue print, and the cars standing upon them, did you do so on your own knowledge, or from information derived from others?
>
> A. From records taken from our yard clerk.
>
> Q. When were the records made up, before or after the fire?
>
> A. Both before and after the fire; that day and in the morning after the fire."

But opposing counsel would, of course, say that this fact of the Terminal making a daily record of these cars as they were set on their tracks, was of no significance, and that beyond question it did not show a delivery of them to the Terminal. Such a contention might have weight if it did not further appear from the petitioners' own evidence that the Terminal, when it made these records, ***entered these cars therein as having been delivered to it on the very day of their arrival in these yards.*** This is shown by "Ex C." identified by, and made a part of the test-

mony of Mr. Phelps, the agent of the Terminal. (R. p. 114) From this transcript of the records of the Terminal appears the car number, "initial, date arrived J. S.-E. date delivered, bridge, date of billing C., P. & St. L. to Eads bridge"

A reference to this record *made by the Terminal acknowledges delivery to it* of the cars arrived, at the certain minute on the *same* day, and does not show a new way-bill under the head "date of billing" for days and weeks after the "delivery."

The delivery thus acknowledged was, of course, the delivery made pursuant to the original manifest or way-bills providing for through carriage, as for instance, from La Crosse to East St Louis, and at the destination therein named.

This record is not of the particular cars in controversy, but was introduced by petitioners *to show the custom* of handling this class of business, and is a fatal admission on the part of the Terminal that it was the "*custom, practice and usage*" for it to consider cars set to this "designated place of deposit" *as delivered to it* for the purpose of storage, *without further notice.* If the record of the Terminal for these particular *cars did not* show such a delivery, opposing counsel *would certainly have introduced it.*

In support of this we rely on the law, as laid down by this Honorable Court in the case of *Pratt vs. Grand Trunk Railway, 95 U. S., 43.* There the goods

had been shipped from Liverpool to St. Louis in packages marked "P. & F. St. Louis." They were carried by the Grand Trunk Railway to Detroit, where they were destroyed by fire, under circumstances almost identical with the facts in the case at bar. A delivery was held to have been made to the connecting carrier. In the opinion of the court it is said:

> "At the time the fire occurred the defendant had no freight room or depot at Detroit, except a single apartment in the freight depot of the Michigan Central Railroad Company. Said depot was a building several hundred feet in length, and some three or four hundred feet in width, and was all under one roof. It was divided into sections or apartments, without any partition wall between them. There was a railway track in the center of the building, upon which cars were run into the building to be loaded with freight. The only use which defendant had of said section was for the deposit of all goods and property which came over its road, or was delivered for shipment over it. This section, in common with the rest of the building, was under the control and supervision of the Michigan Central Railroad Company, as hereinafter mentioned. The defendant employed in this section two men, who checked freight which came into it. All freight which came into the section was handled exclusively by the employees of the Michigan Central Railroad Company, for which, as well as for the use of said section, said defendant paid said company a fixed compensation per hundred weight. Goods which came into the section from defendant's road, destined over the road of the Michigan Central Railroad Company, were, at the time of unloading from defendant's cars, deposited by said employees of the Michigan Central Railroad Company in a certain place in said section, from which they were loaded into the cars of said latter company by said employees when they were ready to receive them; and, after they were so placed, the defendant's employees did not further handle said goods. Whenever the agent of the Michigan Central Railroad Company would see any goods deposited in the section of said freight building set apart for the use of the defendant, destined over the line of

said Central Railroad, he would call upon the agent of the defendant in said freight building, and, from a way-bill exhibited to him by said agent, he would take a list of said goods, *and would then, also, for the first time learn their ultimate place of destination*, together with the amount of freight charges due thereon; that from the information thus obtained from said way-bill in the hands of the defendant's agent, a way-bill would be made out by the Michigan Central Railroad Company for the transportation of said goods over its line of railway, and not before.

These goods were, on the 17th of October, 1865, taken from the cars and deposited in the apartment of said building used as aforesaid by the defendant, in the place assigned as aforesaid for goods so destined.

At the time the goods in question were forwarded from Montreal, in accordance with the usage in such cases, a way-bill was then made out in duplicate, on which was entered a list of said goods, the names of the consignees, the place to which the goods were consigned, and the amount of charges against them from Liverpool to Detroit. One of these way-bills was given to the conductor who had charge of the train containing the goods, and the other was forwarded to the agent of the defendant in Detroit. On arrival of the goods at Detroit, the conductor delivered his copy of said way-bill to the checking clerk of defendant in said section, from which said clerk checked said goods from the cars into said section. It was the practice of the Michigan Central Railroad Company, before forwarding such goods, to take from said way-bill in the custody of said checking clerk, in the manner aforesaid, the place of destination and a list of said goods and the amount of accumulated charges, and to collect the same, together with its own charges, of the connecting carrier."

In commenting on this case, and in applying the rule of law there laid down to the facts in the case at bar, his Honor, Judge Showalter, in his dissenting opinion, filed in the Court of Appeals, (R p 401) says:

"It will be seen from the foregoing statement that on the course of dealing between the two carriers, *shipping directions had not been received by the connecting carrier*,

The court mentions the mark on the goods, but not as a controlling factor in the decision. The Michigan Central Railroad Company did not look at the marks on the goods for the shipping directions upon which it acted. Under the mode of dealing between the two carriers, the case was the same as though there had been no marks on the packages. The goods were on the platform of the connecting carrier at the time of the loss. The defendant did not own or have any possessory right over that portion of the connecting carrier's station house. Defendant's servants were not privileged either to unload the goods there or to handle the goods afterwards. The servants of the connecting carrier placed all goods which were to be forwarded as designated by the agent of the defendant at a particular locality on the platform in question. The defendant ceased to be and the connecting carrier became the bailee of the goods—*and this before the shipping directions had been given by the one carrier to the other according to the understood mode of dealing between them.* This was a case in which the defendant did not own or possess the unloading platform. If the defendant had owned or possessed that section of the station where the goods were unloaded, the mere placing of the goods in controversy at a particular locality on the platform, from which the servants of the connecting carrier would afterward, without special license from the defendant, take them, would not have changed the custody of such goods. The law upon this point is clear. Nor would the connecting carrier have become bailee even if its agent had received the shipping directions before the destruction of the goods. The fact that the goods were still in the custody of the defendant would, from the standpoint of the shipper, have determined the matter. I may add, that the Grand Trunk Railway Company had no terminal, that is to say, unloading facilities at Detroit, so far as concerned the owner of the goods in question. The section of the station in which the freight of the Grand Trunk Railway Company was unloaded, was owned and possessed by the connecting carrier. In the case at bar, the connecting carrier not only took exclusive possession of the cars in controversy at the terminus of appellant's rails, but hauled them to a point on its own rails to which appellant had, neither in law nor by contract, even a right of access."

It must be remembered that the purpose for which the cars were delivered was not for further transportation, *but for storage*, and therefore no such strict rule as to delivery of way-bills is required. Opposing counsel admit that the consignees had interrupted their transit, and had agreed (with somebody) that the cars should be stored here at East St. Louis.

(b) It was immaterial whether the Terminal knew the contents or fresh destination of these cars.

Opposing counsel argue that the Terminal could not know the contents of these cars, their destination or who the consignees were, until it had received the new way bill, and therefore it could not know whether it was holding them for the consignees. If the Terminal had accepted them, would the fact that it did not know the consignee and the fresh destination, relieve it of the warehouseman's duty to care for them? Would either of those facts change the care and custody back to the receiver, or alter the liability of the Terminal, which attached the moment it accepted the cars? We hardly think a court of equity would release a carrier (which had *actually* accepted cars) from liability for their care, simply because that carrier had not yet been notified of the contents and destination. Courts of law have not even gone to that extent, as is shown in *Illinois Central vs. Smyser, 38 Ill., 354.*

But in point of fact, the Terminal Company must have known from the first minute of its recorded relations to these cars, not only their contents, but also their destination. The vital fact, fully disclosed in the evidence above, that the Terminal had its "yard clerk" always on hand at the arrival of every train, to note and record the day, hour and minute of the incoming of each car; *each of which was covered by a separate way-bill*, (R. pp. 170, 171, 174) necessarily involved an inspection thereof, by which knowledge of contents and destination, including name of consignee, were all obtained. This conclusion is rendered all the more certain from the fact that such inspection would naturally have been made in order to show which cars were to be handled free, which were to be subject to the fifty cents charge for handling, which were to be sent on at once, and which were to be set to store.

The record here shows that it was customary for the Terminal to take certain of these cars and to hold them pending re-sale and a fresh destination. The consignees were expecting shipments daily, and for the very purpose of having them stored until they could dispose of them, they entered into this agreement with the Terminal. The Terminal was to take these cars as fast as they arrived, and were set to their tracks. After the consignees had sold the grain and were ready to give fresh destination, and make a new way-bill, they would be ready to move the grain,

and consequently would have no further occasion to store it; the storage was between the arrival and the making of a new way bill; after that the service was carriage, and not storage.

(c) Issuing of way-bill was not necessary to constitute delivery.

It is the contention of opposing counsel that, notwithstanding the actual physical delivery to the Terminal Railroad Association, the receiver was responsible for the cars and contents up to the time he issued a new way-bill for them and passed that way-bill on to the Terminal Association. Our reply is that *at most* such way-bill is simply evidence of delivery, which may be shown by other competent evidence. Therefore, we insist that it is wholly immaterial and technical to object, that prior to the fire no new way bill had been passed over to the Terminal Company.

No case can be found in which, for the purpose of delivery, it is held that a way-bill is necessary, except where that way-bill is for the purpose of conveying to the connecting carrier information as to the ultimate destination. In this case the cars were not delivered for further transportion, but were for storage, and no ultimate destination could be given to them until the consignees had made a sale of the barley in St Louis and re-consigned it. For any other purpose, at most, such way-bill is simply evidence of delivery and does

not constitute the delivery, and therefore, if actual and physical delivery had been made it can be shown by other evidence. This is established in those cases in which goods are delivered to a railroad company to be held by them awaiting orders for transportation.

In the case of *Illinois Central vs. Smyser, 38 Ill., supra,* where goods had been placed in a car of the railroad company with its assent for the purpose of shipment, the loaded car being under the exclusive control of the company, the court held that the goods thereby passed into the possession of the company as effectually as if they had been delivered in its warehouse. In that case the same contention was made as to bill of lading not having been delivered as in the case at bar. On that point the court said:

> "It is not the mere signing of a bill of lading which transfers the possession of freight to the company, but it is evidence that they have received possession. Their possession may be shown by any other legitimate evidence."

V.

The agreement with the Terminal Association was not a lease by which the Receiver's rails were extended into East St. Louis.

Opposing counsel sought to meet the prima facie case of delivery thus made by the receiver, by construing the agreement which existed between the Ter-

minal and the receiver as a lease of the rails of the former to the latter, and upon this base their argument that the car, at the time of its destruction, was still in the possession of the receiver.

We desire to recur to the fact that the rails of the receiver terminated at a station called Bridge Junction, and did not extend south of the road marked "Stockyards Avenue" on the plat opposite page 112, in the record. Opposing counsel have assumed from the statement in the first clause of this agreement, that the Terminal Association "undertakes to give the party of the second part terminal facilities at East St Louis," that the receiver had no terminal facilities at the terminus of his line. This assumption is unwarranted by the facts In connection with this shipment it was not considered necessary to show that the receiver had terminal facilities at the end of his line, since these shipments were not expected to be handled in the receiver's yards at the terminus of his rails, but from the first were intended to be "set to" the tracks of the Terminal Association, as the next connecting carrier. Therefore, no direct evidence of terminal facilities was introduced. However, by a reference to the "plat of railway yards" in this record (R. p. 112) it will be seen at the bottom of the plat, and toward the middle, the beginning of yards marked "J. S. E. freight yards."

"J. S. E." was the common name by which the railroad operated by the receiver had theretofore been known. (R p. 21.) This identity is also shown by the fact that the line of railroad belonging to the C., P. & St. L. Railway is designated on this plat as the "Jacksonville Southeastern R R." These "J. S. E. freight yards" are referred to and identified by the testimony of the receiver himself, (R p. 239) and opposing counsel tried hard to get him to say that he had no terminal facilities, but did not succeed. Therefore, this agreement was not entered into for the purpose of supplying any deficiency in the line of railroad which the receiver was operating to comply with his common law obligations as a carrier.

The agreement was simply for the purpose of securing a certain and definite rate to be paid to the Terminal Association for switching through cars to and from the rails of the receiver and other companies in the vicinity of East St Louis, and to provide beforehand for the ample and quick handling of such through freight, so that the receiver's own terminal facilities would not become clogged or over-taxed by the accumulation there of such through freight in addition to that which was purely local and destined only to East St. Louis.

In this connection it is well to consider the nature of the railroad of the Terminal Association, and the character of the business that it solicited and carried

on. By a glance at the plat (R. p. 112) it will be seen that the rails of the Terminal connect with all of the many railroads centering in East St. Louis; this taken with the name of the Association points directly to the fact that it is a switching railroad, which serves all other railroads centering in East St. Louis by delivering cars from one to the other.

As a matter of fact, it could have been shown that the Terminal Railroad Association has the same sort of an agreement with every other railroad entering East St. Louis, as it has with the receiver.

Unless, therefore, it can be said that the mere fact of the Terminal Association being a switching railroad, whose main business is simply the switching of cars from one railroad to another, prevents it from assuming the character and liability of a connecting carrier for the cars while they are in its possession in the course of such transportation from one railroad to another, then we submit that the existence of such an agreement as that of August 1, 1892, does not in itself change the relations between the Terminal Association and other railroads from which it receives cars.

In *Missouri Pacific R. R. vs. Grocery Co., 55 Kan. 525*, we find a logical statement of the reason why the mere fact that a railroad is a switching railroad does not relieve it of the liability of a connecting carrier.

In that case a car load of sugar sent from Louisiana was consigned to the plaintiff, a grocery company at Witchita. It was shipped over the Texas & Pacific Company's line, and was brought to Wichita by the St. Louis& San Francisco Company. It was there placed on the "Y" and switched by the defendant company over its tracks to the spur track in the rear of the plaintiff's warehouse, for which service the St. Louis & San Francisco Company paid their regular switching charge of two dollars per car. The court held that the defendant was liable as a common carrier for a loss occurring after it had taken charge of the shipment, and before the plaintiff had had reasonable time in which to remove it, among other things saying:

> "A railroad transporting a passenger or a car load of freight one mile, using a switch engine for motive power, is just as much a common carrier as if the distance were a thousand miles by regular freight or passenger train. The fact that compensaton for this particular service was paid by the St. Louis & San Francisco Railroad Company, while it might render that company also responsible, it could not relieve the defendant company from its liability as a carrier."

To sustain the contention that the agreement of August 1, 1892. excluded the relation of connecting carriers, between the two companies. or that the contract itself made them respectively principal and agent as to the interchange of all traffic between them, it is absolutely necessary to ignore the fourth provision of the contract which is: (R. p. 111.)

> "Fourth. All cars consigned to and from the East St. Louis freight house of the party of the second part,

> to be switched to and from the Wiggins Transfer tracks without extra charge. Regular switching charges and rules to apply to all other cars to and from connections, the party of the first part to be governed in making its collections by instructions shown on bill to it, as to who should pay. In the absence of any instructions the switching charges will follow the car."

This clause expressly recognizes and provides for that interchange of traffic which occurs between connecting carriers, and by it provision is made that the regular switching charges and rules shall apply on all cars, to and from connections; that is, that the regular switching charges shall apply to certain cars which necessarily had to pass over the tracks of the Terminal Association to the tracks of other railroads connecting with the latter.

Now, it is to be remembered, that this contract does not provide that *certain* yards or *any special* place or territory in the yards of the Terminal Association are to be set aside for the *exclusive* use of the receiver, *in the sense that he was to exercise any dominion over or have any possessory right therein.* Nor does the evidence, in fact, show that any particular portion of the yards were set aside for the *exclusive* use of the receiver.

John Weidmer, of the Gratiot Street Warehouse Company, testified that he rented of the Terminal Association a warehouse which was right in the middle of that part of the Terminal's yards, which opposing counsel refer to as the appellant's "portion" of these

yards; that some of the tracks ran through the warehouse; and that he rented from the Terminal on the understanding that it had full control. (R. pp. 212, 213.)

The servants of the Terminal Association may have been accustomed to haul cars from the receiver's road to some special territory in the yards of the Terminal, and that territory may for the time being have been "the yards set aside for the use" of the receiver, within the sense of the second section of the contract, ***but such servants did not do this by any direction from the receiver;*** nor was any right in him to direct or control them, or to designate the place on the grounds, or rails of the Terminal Association where any car received from his road should be at any given time in any way recognized (R. p. 109-201) ***This was the construction given to the contract and acted on by the parties.***

The agreement will be searched in vain for words of conveyance. There can not be found in it any transfer of any estate in the grounds or tracks, or any part thereof, or of any possessory interest in its engines, or control over its servants, from the Terminal Association to the receiver.

The conduct of the Terminal Association at the very fire which caused this great loss, emphasizes the absence of any attempt on the part of the Terminal to make any such transfer by this agreement. As soon as the fire broke out, the receiver had an engine

close by on its own rails, and his employees attempted to go in and hitch on to these cars and pull them away from the burning warehouse, but were prevented from so doing by the employees of the Terminal (R. p. 193). The evidence further shows that while a great many of the cars which came off of the receiver's road were set on to certain tracks by the Terminal Association, yet it further shows that this was not always the case, and that the Terminal would take the cars to any part of its vast yards which was most convenient to it, and there mingle them with cars from other railroads, and that after the Terminal had taken possession of such cars on the designated "Y," the receiver could in no manner direct the point to which they were to be transported on the rails of the Terminal. (R. p. 197-201) In other words, the evidence conclusively shows that the receiver had no use, direction or control over any portion of the Terminal yard.

Therefore, we earnestly submit, that the contract in question is nothing more than the result of precautionary measures on the part of the receiver for the prompt and adequate handling of *through* freight by his connecting carrier, the Terminal, and *beyond this* is nothing more than a *a division of the freight charge between the two connecting carriers.* As his honor, Judge Showalter, in his dissenting opinion, filed in the Court of Appeals, said (R p. 397):

> "As said above, the shipper pays no more than if the appellant had himself owned and operated the lines of

the Terminal Association. Such a contract could not interfere with or modify the legal obligation of either carrier to a shipper whose goods are handled successively by both. Neither appellant nor the Terminal Association could evade or alter any legal obligation to a third party by any contract between themselves. If the Terminal Association had alienated to appellant an actual ownership or possessory right over that portion of its tracks where the cars in controversy were destroyed, and such a control over its employees and engines, that said employees, when engaged in handling the cars in question, were the servants of appellant, and the engine used by them his engine for the time being, the case would be different. On this hypothesis, the tracks where the cars were distroyed would have been appellant's tracks, the employees who hauled the cars to that point his servants, the engine used by them his engine, he would have continued to be the bailee of the property, and the matter of way-bills or junction reports would have signified nothing. But in my judgment, as said, *the contract in question had no force as of alienation* by the Terminal Association to appellant of any possessory right, interest or estate in or over any property of the former company, or of any control over its servants. Neither the relation of lessor and lessee, nor that of licenser or licensee existed between these parties as resulting from said contract so far as it concerned the cars and contents in question."

VI.

The Agreement between the Receiver and the Terminal did not make them Principal and Agent.

It was also argued in the courts below that the agreement of August 1, 1892, between the Terminal Railroad Association and the Chicago, Peoria & St. Louis Railway Company, made the former the agent of the latter. In the opinion of his honor, Judge Jenkins, it will be seen that he also is inclined to this view.

From an inspection of this agreement (R. p. 111) it will be found that the Terminal Railroad Association only agreed to furnish necessary yard room and track facilities in their yards at East St. Louis, for the purpose of handling such freight as might originate on the line of the Chicago, Peoria & St. Louis Railway Company, or be received by that railway company from other lines, to be carried to St Louis or points beyond St. Louis, over the rails of the Terminal Association. For this service the Terminal was to receive the customary charges for the handling of each car, just as any other connecting carrier would receive.

A case which is analogous to the one at bar, is *St. Louis Insurance Company vs. St. Louis, Vandalia, Terre Haute & Indianapolis R. R. Co., 104 U. S., 146*, There this court held that an arrangement between a Dispatch Company and sundry railroad companies, whose lines terminated at New York, whereby the latter, separately, agreed to carry all goods for the transportation of which the former should contract, at the established tariff rates, did not involve a joint liability on the part of the railroad companies, nor make the Dispatch Company the agent of the railroad companies, the court saying:

> "The Dispatch Company and the defendant had, it is true, certain business relations, but those relations did not necessarily involve an agency upon the part of the former for the latter, in the making of contracts for transportation. The agreement between those companies only bound the railroad company to 'receive, load and

> unload, deliver and way-bill' such freight as was sent to it by the Dispatch Company, and at the rates established, not by the latter, but by the defendant and other railroad companies."

So, we submit, in the case at bar, that the agreement between the receiver and the Terminal Railroad Association only bound the latter to properly take care of and handle all freight which the former might deliver to it on the designated "Y," and at the rates established, not by the receiver, but by the Terminal.

It might as well be argued that every railroad company which enters into an agreement with a coal company to furnish it so many cars a day, and to haul those cars at a certain price, thereby becomes the agent of the coal company, or thereby leases to it the cars and that portion of the rails necessary to make the haul contemplated.

(a) The appellant did not pay the Terminal for storing these cars.

Opposing counsel predicate their "theory of agency" existing between the appellant and the Terminal, as to the handling of these cars, on the unwarranted *assumption* that the appellant paid the Terminal fifty cents a car. We quote from petitioner's brief (p. 15):

> "The Terminal Company, therefore, acted merely as the *servant or agent* of the receiver in breaking up his trains and placing the cars on certain tracks for which

> it received from the receiver fifty cents a car. *Ordinarily, one railway company does not pay to another railway company fifty cents a car for the privilege of delivering cars to it.*"

Notwithstanding the fact that their own witness (R. p. 87) testified that this service of making and breaking trains was a "separate and distinct service" from the storage, and notwithstanding the fact that no loss occurred during the "breaking" of the trains, or by reason of its negligent performance, and notwithstanding, therefore, the matter is wholly irrelevant and immaterial, we think that there is no basis in this record for the ***assumption*** that the appellant paid the Terminal fifty cents a car for these cars.

Mr. Phelps testified (R. p. 82) generally that this work was done under a contract at fifty cents per car. The contract referred to (R. p. 111) provides that the work done shall be:

> "at the rate of fifty cents per loaded car in and out, *except cars on which the party of the first part receives a bridge toll, which will be handled free.*"

If, as contended by opposing counsel, all these cars were destined to St. Louis, every one of them would be cars "on which the party of the first part" (the Terminal) would receive a bridge toll, and which in consideration of its receiving such toll, ***and not in consideration of payment by the appellant,*** the Terminal handled these particular cars. Was then such handling, by the Terminal, *for itself,* or as agent of the receiver?

Clearly for itself, as principal. And for the further reason that it solicited and secured this business from the grain brokers in St. Louis, solely to prevent its coming down on the west side of the river, in which event they would have received no toll. (R. p. 261-3.)

VII.

The custom existing between railroads as to liability for cars is the law.

Opposing counsel say that the claim for the cars destroyed rests on a somewhat different ground than do the claims for barley destroyed. They state the rule correctly as to the system of car book-keeping, and also that where a car has been delivered to a connecting carrier, until such delivery *is so reported*, the car shall stand *charged* to the company last reported as having received it. But there is no agreement between railroads by which a mere *charge* of this kind can *create and establish a liability* for the car. We hardly take it that counsel meant to assert such a proposition. They do, however, further state that if a car is destroyed while on the tracks of that company, such company shall be liable therefor the same as it would be for any other property. To this we assent, because it merely states a well known rule of law.

We therefore submit that the argument of opposing counsel, that there is a liability in the receiver for these cars simply by reason of the fact that there was a failure to *notify* the Chicago, Milwaukee & St. Paul Company of their delivery to the Terminal, and therefore that the C., M. & St. P. Company on their car books still had the receiver *charged* with them, is by no means tenable.

If this were so, liability could be created and divested by a simple means of bookkeeping, *without ever moving a car a foot*. We know that opposing counsel would not agree that if, even in this case, the receiver had sent in a report that these cars had been delivered to the Terminal, that therefore the receiver was relieved of all liability, and that liability was vested in the Terminal.

This is but an argument based upon constructive delivery of the cars by junction reports, and the freight by way-bills, which was thoroughly submitted at the hearing. The danger of adopting such a theory is at once apparent, since if it is held that delivery depends upon the issuing of junction reports, and if no junction reports have been issued no delivery has been made, then a railroad company could divest itself of liability by merely issuing such reports, although, in fact, it had not delivered the cars. The question of liability, both as to cars and freight, is the same, and depends upon the actual possession.

The Supreme court of Illinois held, in *Peoria Ry. vs. Chicago Railway, 109 Ill., 135*, that a carrier of cars holds the same relation to the cars as it does to the freight, and on the oral argument of these cases in the Court of Appeals. opposing counsel assented to this principle, and we find this case cited in their original brief filed in that court, and in this court.

In *Railway Company vs. Railway Company, 123 Ill., 594*, it is expressly held that if cars had been set on the private delivery track belonging to the consignees, for loading or unloading. then they are in the possession of the consignee, and consequently its liability is interrupted during the time they are so out of its possession. These cars were set on the tracks of the Terminal Railroad Association out of the possession and control of the receiver and for the purpose of storage awaiting a fresh destination from the consignees by express agreement between them and the Terminal Association.

CONCLUSION.

At the conclusion of opposing counsel's brief an appeal is made to this court based on their own bad judgment in suing the wrong carrier. Citing the predicament of Bromley in *Midland Ry. vs. Bromley, 8 J. Scott, 372*, and as usual charging his last sad plight to the court and not to the error of his counsel. they ask this court, solely for the purpose of saving their clients, to

unjustly charge the receiver with the loss. If they have deliberately turned their back upon a plain, well defined and highly equitable right of action against the Terminal Railroad Association, through whose gross negligence the loss was occasioned, and which right of action still exists, and in the end find themselves in Bromley's condition, surely, they have nobody but themselves to blame.

The court will not, however, look in vain for the motive which impelled counsel to select for an opponent in these suits the receiver, representing a small bankrupt railroad, instead of the Terminal Association, a large and powerful corporation virtually controlling all entrances to St. Louis. From the beginning of this litigation, the record shows a deliberate combination between the Chicago, Milwaukee & St. Paul Railway, the one *prima facie* liable as the initial carrier, and the Terminal Association, clearly liable as the carrier upon whose rails and through whose gross neglect the loss occurred, for the inequitable purpose of imposing the liability on this respondent (R. p. 108, 138, 183).

In conclusion we submit that the petitioners have not brought their cases within any of the well settled rules laid down by this court for the granting of certiorari. That in addition to this the cases have been vigorously fought from beginning to end, full written briefs were submitted and oral arguments made at the hearing in the Court of Appeals; that the cases

were there given mature and deliberate consideration; and lastly that the judgment of that court on the merits of the cases is in harmony with decisions of this Honorable Court, and is right and just.

Respectfully submitted.

Bluford Wilson
Phelps Barton Warren

Solicitors for Respondents.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1899.

CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, *Petitioner*,
vs.
C. H. BOSWORTH, *Receiver*,
No. 62.

HUNTING ELEVATOR COMPANY, *Petitioner*,
vs.
C. H. BOSWORTH, *Receiver*,
No. 63.

JACOB RAU, *Petitioner*,
vs.
C. H. BOSWORTH, *Receiver*,
No. 64.

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR SEVENTH CIRCUIT.

Brief and Argument for Respondents.

BLUFORD WILSON,
PHILIP BARTON WARREN,
Counsel for Respondents.

STATEMENT.

NOTE—By reason of the fact that the evidence in this case was also taken in that of *Jacob Rau vs. C. H. Bosworth, Receiver*, it was agreed to print only one record, and the references in this brief to record pages are to the record in the Rau case, October Term, 1898, No. 285 (16,858).

The Chicago, Milwaukee & St. Paul Railway Company.

The intervener, the Chicago, Milwaukee & St. Paul Railway Company, was the owner of thirty-eight (38) cars mentioned and described in its petition. During the evening of the 28th day of October, 1894, while on the tracks of the Terminal Railroad Association of St. Louis, in its yards at East St. Louis, they were damaged by fire to the extent of $9,033.73.

The destination of these cars was shown by the way-bills, which accompanied them, except in a few cases, and in those cases by a copy of the shipper's receipt. It appears that no original shipper's receipts were issued. After the fire the shippers demanded of the initial carrier, the said St. Paul Company, receipts in aid of these suits, but the agent of the railway company would not issue them without marking them "copy" or "duplicate." These way-bills and receipts were introduced in evidence by interveners. (R. p. 266) As to all the cars, except five, the way-bills show that they were to be moved from their point of receipt to East St. Louis, although in a column under the head of "marks and consignees" the name of the consignee and the words "St. Louis, Missouri," appear. As to one car, No. 46064, the way-bill reads from Wykoff, Minnesota,

to St. Louis. This, however, is apparently a mistake, inasmuch as the shipment consisted of that car and another numbered 43222, and the way bill for the latter read from "Wykoff to East St. Louis." They both arrived at East St. Louis, October 25th, the same hour and train, 1:45 p. m. (R. p. 237). In addition to this, on the station receipts for these two cars, under head of marks and consignees, appear the words "The Orthwein Grain Company, East St. Louis." (R. pp. 158–161, 173).

As to cars Nos. 10071, 34908, 10536 and 3218, the way-bills introduced in evidence read on their face "Way-bill of freight forwarded from Lake City to St. Louis." These four way-bills are marked "Copy" and there is nothing in the evidence to show that they are true copies or why the originals were not introduced. The cars went into yard at East St. Louis and were destroyed, along with other barley cars in store there.

The initials, numbers, route, origin and destination of the cars, were as follows:

Initials.	Numbers	From	To	
C., M. & St. P.	32986	La Crosse, Wis.	East St. Louis	R. pp. 141-145.
" " " " "	20022	" "	" "	
" " " " "	1100	" "	" "	
" " " " "	6842	McGregor, Iowa	" "	R. pp. 149-150.
" " " " "	10720	" "	" "	
" " " " "	18126	" "	" "	
" " " " "	3728	" "	" "	
" " " " "	4126	" "	" "	
" " " " "	2598	" "	" "	
" " " " "	12336	" "	" "	
" " " " "	37506	" "	" "	

Initials.	Numbers	From	To	
C., M. & St. P.	11836	Prairie DuChien, Wis.	East St. Louis	R. pp. 154-155-161-162
" " " "	33090	" "	" "	
" " " "	16802	" "	" "	
" " " "	12	" "	" "	
" " " "	680	Wykoff, Minn.,	" "	
" " " "	46064	" "	St. Louis	
" " " "	43222	" "	East St. Louis	
(Station receipts for cars No. 46064 and 43222 under marks and consignees is "The Orthwein Grain Co., East St. Louis."				
C., M. & St. P.	43080	Lime Springs	East St. Louis	
" " " "	32194	"	" "	
" " " "	34574	"	" "	
" " " "	17272	La Crosse	" "	R. pp. 154, 246, 248
" " " "	3524	Savannah	" "	
" " " "	31098	"	" "	
" " " "	33134	"	" "	
" " " "	2430	"	" "	
" " " "	31204	"	" "	
" " " "	46992	"	" "	
" " " "	15944	"	" "	
" " " "	6364	"	" "	
" " " "	12886	"	" "	
" " " "	10071	Lake City	St. Louis	
" " " "	34908	"	"	
" " " "	10536	"	"	
" " " "	3218	"	"	
" " " "	1232	La Crosse	East St. Louis	R. p. 145-6
" " " "	1154	Ossian, Iowa	" "	
" " " "	38108	" "	" "	

The statement at page 3 of opposing counsel's brief that "the destination of all the barley shipments was St. Louis, Missouri," is thus squarely in conflict with the way-bills and bills of lading. The stipulation referred to by counsel, is that the barley was "consigned to the Teichman Commission Company, St. Louis, Missouri, via East St. Louis, Illinois." This is simply the name and place of residence of the consignee, *not the place of destination.* We agreed only as to the *person* to whom it was consigned, *not as to the place of destination.* There is a radical difference between the meaning of the words "consigned" and

"destined;" the former refers *only* to persons and implies the transfer of something in trust (*Ency. Law, Vol. VI, 2d Ed., 798*), while the latter refers only to place. Thus "consigned" to Teichman, of St. Louis, but "destined" to East St. Louis, there to be held, as shown by the evidence, until re-sold and re-billed to fresh and final destination.

In the statement of facts by the Circuit Court of Appeals it is said:

> "It satisfactorily appears further that it was the custom of brokers and buyers at St. Louis to leave in the cars until sold, certain classes of goods, and particularly consignments of barley, received upon the track of the Terminal Railroad Association, whether billed to St. Louis or East St. Louis, the mode of selling goods so held being by samples taken on the arrival of cars by agents of the consignees employed to visit daily the yards for that purpose." (R. p. 343)

But aside from the way bills and bills of lading the testimony abundantly shows that East St. Louis was the "port of entry" for that class of goods for St. Louis, and was therefore the end of transit under the only contract to which the receiver was a party. (R. p. 231.)

Jacob Rau.

The intervener, Jacob Rau, delivered to the Chicago, Milwaukee & St. Paul Railway Company, on the 10th and 16th days of October, 1894, two car loads of barley, Nos. 46064 and 43222; said barley was damaged or destroyed by the same fire, while in the yards

of the Terminal Railroad Association at East St. Louis, to the extent of $1,144.07; the said cars were consigned as follows:

No. 46064, from Wykoff to St. Louis, as shown by way-bill, but as shown by station receipt destination appeared to be East St. Louis; No. 43222, from Wykoff to East St. Louis. (R. pp. 36, 158, 160–1.)

Huntting Elevator Company.

The intervener, the Huntting Elevator Company, delivered to the Chicago, Milwaukee & St. Paul Railway Company ten car loads of barley on the following days: On the 24th day of September, 1894, cars Nos. 11836 and 33090; on the 13th day of October, car No. 34574; on the 15th day of October, car No. 32194; on the 18th day of October, car No. 43080; on the 12th day of October, car No. 12; on the 20th day of October, cars Nos. 178, 7285, 16802 and 46648; the said barley was damaged by the same fire to the extent of $2,600.56, while in the yards of the Terminal Railroad Association at East St. Louis; the cars were consigned as follows: (R. pp. 35–38, 154, 155, 161, 162.)

Initials.	Numbers.	From.	To.
C., M. & St. P.	11836	Prairie DuChien	East St. Louis
" " " " "	33090	" "	" "
" " " " "	16802	" "	" "
" " " " "	46648	" "	" "
" " " " "	7285	" "	" "
" " " " "	178	" "	" "
" " " " "	12	" "	" "
" " " " "	43080	Lime Springs	" "
" " " " "	32194	" "	" "
" " " " "	34574	" "	" "

The foregoing statement is of facts about which there is no dispute, the greater portion of which is stipulated. (R. pp. 31, 47.)

The barley was hauled by the Chicago, Milwaukee & St. Paul Railroad Company from the respective points of receipt to Rock Island; there delivered to the Rock Island & Peoria Railway, and hauled to Peoria; there delivered to the Peoria & Pekin Union Railway, and hauled to Pekin; there delivered to the receiver of the Chicago, Peoria & St. Louis Railway, and hauled to the terminus of his line in East St. Louis, and there delivered, upon the designated "Ys" of the Terminal Railroad Association, where the engines of that Association took the cars and set them on its own tracks, in its own yards, at East St. Louis. (R pp. 74, 184, 187, 207, 209. 213, 222, 229.) At the time of the fire these cars had been accumulating at this last point for some time, one of them coming in as early as September 28, others about the middle of October, and others not until the afternoon of the night of the fire. (R. p. 237.)

This barley was to be sold again by the consignees, grain brokers in St. Louis, and by arrangement between them and the Terminal Railroad Association it was to have been held, storage free, at the place where it was damaged, until such sales could be effected and a re-consignment of the barley made to the con-

suming purchasers from the grain brokers. (R. pp. 75, 140, 162, 238, 242, 243, 244, 187, 191, 210, 211, 216, 219, 229, 306, 308.) The periods during which such cars ordinarily remained on the tracks at East St. Louis was determined by the sale of the barley by the consignees, which in its turn was controlled by the state of the market. (R. pp. 190, 238, 242, 308.)

See also statement of facts by the presiding circuit judge in the opinion of the court below. (R. pp. 340-344.)

We especially challenge the accuracy of the following propositions of fact found in the "Statement of the Case" by opposing counsel.

1. "*The remaining sixteen cars were repaired by the receiver and no claim for damage is made as to them.*" (Brief pp. 2, 65, 66.)

The statement is misleading and unfair. The repairs were made by the receiver under express written stipulation with the Terminal Association that such repairs should be made as matter of salvage, but without prejudice to the receiver in the controversy as to liability. (R. pp. 61, 124, 125, 219, 220, 223, 231, 236.)

2. "*And so far as the record shows the receiver did collect such insurance.*" (Brief p. 13.) The statement is repeated. (Brief p. 47.) The obvious purpose is to

show that the receiver had recognized and accepted liability in the premises. The wholly gratuitous charge is thereupon made that "*the claims* (in opposition to such liability) *which the receiver now puts forth are an afterthought.*"

It is difficult to deal calmly with such careless, if unintentional, mis-statements of the evidence. Gregory, a witness in behalf of the receiver, testifies that the claim was presented to the insurance companies under the sixty day limiting clause *and was rejected.* (R. p. 138.) Bosworth, the receiver, explicitly testified that the insurance companies had not accepted the claim. (R. p. 225.) The master's report shows that the receiver's action in filing his claim against the insurance company was "because of the time limit imposed by the insurance policies," and like the matter of salvage, was to be without predjudice. (R. p. 61.) It further appears of record that the question was as to whether "the barley is covered by their (the receiver's) insurance policy or by the one held by the Terminal Railway Company, which will soon be determined, as that company is co-operating with the J. S-E. R. R (the receiver) to effect an adjustment." (R. pp. 58, 321.)

As the claim of the receiver was rejected by the insurance company the presumption is clear from the evidence, as to the place and details of the fire, that

the claim was declined because the rails upon which the property was stored at the time of the fire did not belong to the receiver, and were not under his control. It has never been questioned that the legal title to the rails was in the Terminal Association, and as shown by the evidence, were under its exclusive control.

> "In the case at bar the connecting carrier (Terminal Association) not only took exclusive possession of the cars in controversy at the terminus of the appellant's (the receiver's) rails, but hauled them to a point on its own rails to which appellant had, neither in law nor by contract, even a right of access." (Judge Showalter's opinion, R. pp. 363, 358.)

3. And so all the acts attributed in their "Statement," by opposing counsel, to the receiver, touching the handling, storage, and re-billing and forwarding the grain after its arrival at the end of the receiver's rails in East St. Louis, and its care, custody and control meanwhile, were, in fact, done by and were directly attributable to the Terminal Association or to the consignees. And this is especially true as to the culpable neglect of the Association, resulting in the fire and the loss, and the gross misconduct of its agents during the progress of the fire. We have dealt with these in the body of our brief It would take many pages to point them out in detail.

4. We object generally to the "Statement of the Case" by opposing counsel as being contrary to the

actual facts; to the plain tenor of the weight of the evidence and to the reasonable presumptions arising therefrom.

After the fire mentioned each one of the petitioners filed an intervening petition in the cause of the Mercantile Trust Company against the Chicago, Peoria & St. Louis Railway Company, pending in the Circuit Court of the United States for the Southern District of Illinois, in which C. H. Bosworth had been appointed receiver of the said railway company, and which railway, at the time of the fire, he was operating as such receiver. The petitions, however, make the railway company, and not the receiver, party defendant, and aver that the property destroyed was at the time "in the possession of and under the control of the said defendant railway company" as a common carrier. (R. p. 21.)

Our defense is that the Terminal Railroad Association of St. Louis, as warehouseman, either for itself as principal, or as agent for the consignees, had actual custody, care and control of the property at the time of the fire, which was caused, and the property destroyed, by its gross neglect (R. p. 22 and 43.)

The Terminal Railroad Association of St. Louis is a company owning tracks in East St. Louis and across the bridges into St. Louis, which connect the various railroads centering there. Its business is that

of hauling and interchanging cars coming in on one railroad for delivery to another; also to haul cars destined to St. Louis from the termini of the several railroads in East St. Louis, across the bridges into St. Louis; also storing freight for their customers. (R. p. 195.) As a regularly incorporated common carrier it performed like service for all railroads terminating at East St. Louis, its only competitor being the Wiggins Ferry Company. The contract originally entered into between the Association and the Peoria Company, prior to the receivership, contemplated only these classes of business, and fixed a charge for the same, *except cars on which the Terminal company received a bridge toll, which were to be handled free* of any charge to the Peoria company, the express language of the contract being: "Except cars on which the party of the first part (Terminal Association) receives a bridge toll, which will be handled free; empty cars in and out free." (R. p. 100.) All the cars in controversy, on the theory of the interveners, were *prima facie* of the "bridge toll" class.

When the petitioners filed their interventions in this cause, the receiver was not fully aware of all the circumstances surrounding the particular shipments of grain referred to in the various petitions. He therefore was compelled to make the best answer he could in the light of his knowledge at that time. He filed his answer to all of them, alleging delivery in the

due course of business, of all these shipments to the Terminal Railroad Association. Later on, during the taking of evidence, other facts were developed. To cover these the receiver filed an amended answer. In this amended answer he alleged that the shipments in question, at the time of the fire, had been delivered to the Association, and were under its sole custody and control *for the convenience of the consignees.* (R. pp. 43-44.)

The claims of the petitioners, except the Chicago, Milwaukee & St. Paul Railway Company, in which the claim is for damage to cars, are for damages to barley shipments caused by the fire of October 28th, 1894. These barley shipments originated in Iowa, Wisconsin and Minnesota, at various points on the Chicago, Milwaukee & St. Paul Railway.

All of these intervening petitions were consolidated, and the evidence taken was to apply to them all. The master, after having heard and considered the evidence, filed a separate report in the case of each petition, but inasmuch as nearly all the points in controversy are raised by the facts surrounding each petition, they have all been treated in one argument.

Upon hearing before the Master in Chancery he reported in favor of all of the interveners, to which reports exceptions, by the receiver, were duly taken and filed. (R p. 64.)

The matter then came on for hearing before the Circuit Court upon these exceptions, which upon consideration were overruled and decrees entered in favor of the interveners, in the amounts claimed by them, together with interest from the date of the master's report. (R. p. 67.)

From these decrees, appeals were prayed and perfected to the United States Circuit Court of Appeals for the Seventh Circuit, both by the receiver and the Chicago, Peoria & St. Louis Railroad Company of Illinois, the assignee of the purchaser of the railway property at the foreclosure sale. (R. p. 328, 331.) Said appeals came on for hearing in the Court of Appeals before their Honors, Judges Woods, Jenkins and Showalter, and were argued, and subsequently, on the 25th day of February, 1898, the Court of Appeals handed down its decision, wherein and whereby the decrees of the United States Circuit Court for the Southern District of Illinois, were reversed (R. p. 364); his Honor, Judge Jenkins, dissenting therefrom. (R. p. 350.)

On the 27th day of March, 1898, the appellees in the Court of Appeals, filed their respective petitions for rehearing (R. p. 366), which were subsequently, on or about the first day of April, 1898, overruled. (R. p. 367.)

From these decrees of the Court of Appeals, the appellees therein made application to this Court for writs of certiorari, which were granted.

The total amount of the loss occasioned by the fire was $46,607.74; the amount covered by the claims of the petitioners is $21,876.93. (R. pp. 165, 170.)

Of these claims, appeals have been perfected only by the Chicago, Milwaukee & St. Paul Railway Company, the Huntting Elevator Company, Jacob Rau, and Carr, Ryder & Engler Company. The other five claims, under stipulation, are to abide the result of the decision in the cases appealed.

As to all of the other claims, not appearing in these records, like stipulations have been entered into between counsel, to the effect that they shall also abide the result of the adjudications herein.

BRIEF OF ARGUMENT.

I.

At the time of the loss and damage the liability of the Receiver as a common carrier had ceased.

(a) *The cars had arrived at East St. Louis, their place of destination, as shown by the way-bills.*

(b) *The consignees also designated East St. Louis as the destination.*

Ency. of Law, Vol. II. (1st ed.) 897;
Southern Express vs. Dickson, 94 U. S., 549;
London Ry. vs. Bartlett, 7 H. & N., 400;
Mitchell vs. Ede, 11 A. & E., 888;
Foster vs. Frampton, 6 B. & C., 107;
Sweet vs. Barney, 23 N. Y., 335.

(c) *The transit had therefore ended.*

Railway vs. Mfg. Co., 16 Wall., 318;
Insurance Co. vs. St. Louis R. R., 14 Otto, 146;
Converse vs. Transportation Co., 33 Conn., 166;
Merriman vs. Railroad Co., 20 Conn., 354;
Pratt vs. Grand Trunk, 5 Otto, 43.

(d) *Unable to overthrow the fact of actual delivery to the Terminal Association, petitioners seek to avoid its effect by a technicality.*

Missouri Pacific Railway Co. vs. McFadden, 154 U. S., 155;
King vs. Lady Franklin, 8 Wall., 325.

(e) *The carrier was not required, in the usual course of business, nor expected, to remove the freight from the cars.*

(f) *No particular place of delivery was designated by the contract of carriage.*

(g) *Not only in the usual course of business, but also by special arrangement, the cars and their contents were placed on the tracks of the Terminal Railroad Association, for free storage, for the convenience of the consignees.*

(h) *Petitioners abandon the position assumed in the lower courts.*

(i) *The agreement for free storage is an established fact.*

(j) *Free storage was in fact one of the chief inducements which the Terminal offered to secure business from its competitors and to procure shipments down the east side of the Mississippi River to East St. Louis.*

(k) *When new way-bills were issued time for storage had passed.*

(l) *If the agreement to store the cars was between the Receiver and the consignees, then the Receiver was not liable.*

(m) *Such an agreement would at most make the receiver a warehouseman.*

Greg, vs. Ills. Cent. R. R., 147 Ill., 550.

II.

In the performance of the original contract of carriage, nothing remained to be done by the Receiver.

(a) *A common carrier is under no obligation to notify a consignee of the arrival of a shipment.*

Transportation Company vs. Hallock, 64 Ill., 284; and authorities there cited.
Gashweiler vs. Wabash, 83 Mo., 122.
Hotzclaw vs. Duff, 27 Mo., 395.
Cramer vs. Express Co., 56 Mo., 528.
Rankin vs. Pacific, 55 Mo., 168.
Ills. Cent. vs. Carter, 165 Ill., 570.

(b) *Consignees had notice.*

(c) *In point of fact they were always on hand to note and tally arrivals.*

(d) *The Receiver owed no duty as a common carrier to store cars and contents at East St. Louis for the convenience of the consignees.*

(e) *The duty of the Receiver to safely carry and deliver freight having ended, any custom or practice of his employes in aiding the consignee in giving directions for future transportation, was purely an accommodation to the consignee for which the Receiver was in no wise responsible.*

(f) *Goods held subject to orders are held as warehousemen.*

Railroad vs. Montgomery, 39 Ill., 335;
Railroad Co. vs. Scott, 42 Ill., 139;
Cairns vs. Robbins, 8. M. & W., 258;
Pittsburgh vs. Barrett, 3 Am. & Eng. R. R. Cases, 256;
Michigan R. R. vs. Northern R. R., 7 Mich., 515;
O'Neil vs. N. Y. Cent., 60 N. Y., 138;
Barron vs. Eldredge. 100 Mass., 455;
Nichols vs. Smith, 115 Mass., 332.
Huchinson on Carriers, § 82;
Angell on Carriers, § 134 and note.
St. Louis vs. Knight. 122 U. S., 79.

(g) *Where the consignees are accustomed to use the warehouse of the carrier, the transit ends when the goods arrive.*

Foster vs. Frampton, 6 B. & C., 107;
Scott vs. Petitt, 3 Bosanquet & Pullier, 469;
Rowe vs. Pitford, 8 Taunton, 83.
Allen vs. Gripper, 2 Compton & Jervis, 218.

(h) *By arrangement the consignees used the tracks of the Terminal Association for warehouse purposes.*

(i) *Being sued as a carrier, recovery can not be had as a warehouseman.*

St. Louis R. R. vs. Knight, 122 U. S., 79;
Railway Co. vs. Mfg. Co., 16 Wall., 318.

(j) *The execution of such an agreement for storage constituted delivery to the consignees.*

III.

The cars and contents were delivered to and accepted by the Terminal.

(a) *Pursuant to custom, the cars were set to a designated place of deposit.*

(b) *It was immaterial whether the Terminal knew the contents or fresh destination of these cars.*

(c) *Issuing of way-bill was not necessary to constitute delivery. Ill. Cent. R. R. vs. Smyser, 38 Ill., 354.*

IV.

The agreement between the Peoria Company and the Terminal Association was not a lease or contract by which that company's rails were extended into East St. Louis.

V.

The agreement between the Peoria Company and the Terminal did not make them principal and agent.

Insurance Co. vs. R. R. Co., 104 U. S., 146.

(a) *The receiver did not pay the Terminal for storing these cars.*

VI.

The same rules of law apply as well to cars as to contents.

VII.

The opinions of the majority of the Court of Appeals are not opposed to each other.

VIII.

The decision of the Court of Appeals is not in conflict with other decisions.

IX.

The original consignees are alone entitled to bring suit.

(a) *The right to possession is in the consignee.*

(b) *Where the consignor has parted with his interest in the goods and the actual owner is the consignee, the latter alone is entitled to bring suit.*

ARGUMENT.

The question presented by this controversy is as to whether or not the respondents are to be held liable for the damage occasioned by the fire in the yards of the Terminal Railroad Association of St. Louis, at East St. Louis, on the night of October 28, 1894, resulting through the gross negligence of said Association, the independent responsible agent of the consignees, and when, in point of fact, the physical possession of the property in question was in said Association, as warehouseman, either for itself as principal, or as agent for the consignees.

The case for the interveners rests largely upon the purely technical ground that no way-bills, or manifests showing the ultimate destination of the said property, had been passed on to the Association, when in fact the goods had reached their destination at East St. Louis, and the contract of the receiver to safely carry the said goods to the end of his rails, and there deliver the same, had been fully completed, the goods meanwhile being in the possession of the said Association, on an agreement between that Association and consignees, awaiting sale and a fresh destination.

In point of fact upon the arrival of the goods at East St. Louis, there were no old way-bills or manifests to be passed on to the Terminal, and for the reason that the way-bills or manifests under which the cars were carried by the receiver read "*To East St. Louis,*" and died in his hands, having been fully executed by him. It was only the *new* way-bills prepared by the consignees or under their direction on "Terminal Association" blanks, and giving a new and further destination and involving further carriage, *beyond the receiver's line* that, in any event, went to the agents of the Association.

The fundamental errors of opposing counsel are:

First: In assuming that the cars were in transit and in confusing the old way-bills, which originated with the initial carrier and which contained the information upon which each succeeding carrier forwarded the goods, with the new way-bills, the information for which originated with the consignee in his new capacity as consignor, and which information he some times sent direct to the Terminal Association, but usually through the receiver.

Opposing counsel also ignore the important fact that such way-bills were the way-bills of the Terminal Association as the initial carrier in the new haul, and were made upon its blanks irrespective of whether the information for the same came direct to it or through the receiver.

Second: In assuming, therefore, it was the receiver who was to furnish the way-bill, and by reason of not having done so that he remained liable for the loss of the goods, when, in point of fact, the information which prevented the cars from moving came from and was withheld by the consignees themselves. Whatever was done by the receiver in connection with the new way-bills was done solely as the accommodation agent of the consignees. It was the consignees, therefore, and not the receiver who alone could start, or could furnish the information which would start, the cars to the consumer under the new contract of carriage. The old way-bill being dead in the receiver's hands, as the last carrier in the line of the original contract of carriage, it follows that the receiver, neither as warehouseman nor as carrier, had any information, incident thereto, which he could have withheld or which he did withhold from the Terminal Association.

I.

At the time of the loss and damage the liability of the receiver as a common carrier had ceased.

(a) The cars had arrived at their place of destination as shown by the way-bill.

The contracts of carriage entered into with the initial carrier, the St. Paul Company, on their face show that the goods were to be moved from the point

of receipt to East St. Louis. The only evidence on this point is the way-bills which were introduced by interveners, and which in all but five instances read "Way-bill of freight forwarded from (point of receipt) to East St. Louis." These way-bills are the papers by which the cars had been moved along their entire route, and were the only instructions which the receiver had for moving the cars from Pekin. It is true that in many of these way-bills, under the head of "marks and consignee," appeared the name of some commission firm "St. Louis, Missouri." ***But this in no wise controlled the movement of the cars.*** The way-bills said that the cars must be moved from the point of receipt "*to East St. Louis.*" The words appearing under the column of "marks and consignee" simply indicated who the consignee was and where he lived. This was for the convenience of the carriers, and not instructions to them to move bulk grain to the residence of the consignee. The destination was plainly and unqualifiedly East St. Louis.

(b) The consignees also designated East St. Louis as the destination.

If, however, we are wrong in our contention that by the contract of carriage East St. Louis was the destination, and the Court can find in the contract itself, the intention of the parties otherwise expressed, that the goods were to be delivered, not at the destination named in the head of the way-bill, but at the

place of residence of the consignee indicated under the head of "marks and consignee," then we desire to call to the attention of the Court the evidence, which we contend conclusively establishes the fact that the consignees themselves named East St. Louis as the destination. If this evidence bears us out it proves one of two things: First, East St. Louis was the destination, not only by contract of carriage, but also by the intention of the parties themselves; or, Second, that the consignees exercised their right to change the destination from St. Louis to East St. Louis.

The evidence to which we refer is the stipulation of record that the consignees, Otto Teichmann, Henry Grieve, L. Lemke and Charles Orthwein, grain brokers, residing in St. Louis, would testify that the:

> "Terminal Railroad Association personally solicited this particular barley business, originating on the Chicago, Milwaukee & St. Paul Railroad, about which this controversy is pending; that these solicitations by the Terminal Railroad Association were made to all the barley dealers in St. Louis to whom the particular consignments of barley were made which are now in litigation; that the Terminal Railroad Association, as an inducement to barley dealers and shippers, agreed to hold the cars on their tracks at East St. Louis, and offered other facilities in and about their yards at East St. Louis, by which the St. Louis Terminal Railroad Association succeeded in securing the business of all the shippers; by that term I mean the consignees and shippers, except the business of the John Wall Commission Company, whose business was being handled by the Wiggins Ferry Company, a competing line with the St. Louis Terminal Railroad Association, and that, at a later day, they also secured the business of this last named firm; and that this solicitation was made in the interest of

> the Terminal Railroad Association for the express purpose of having the business sent down the east side of the Mississippi River, so as to give them the benefit of the transportation across the river at East St. Louis to St. Louis in competition with lines west of the Mississippi River." (R. pp. 238-9.)

If it can be fairly contended the original destination was St. Louis, then it cannot be denied that from the above stipulated evidence the consignees, for their own convenience, changed the destination to East St. Louis, and their right to do so only remains to be discussed. On this point, the weight of the authorities is thus summed up in *Ency. of Law, Vol. II, (1st ed.) p. 897:*

> "The right to demand a re-delivery by the carrier, or to change the original destination of freight, depends upon the ownership of the goods, and the notice to the carrier of such ownership. The rule is said to be, that where the consignor is known to the carrier to be the owner, the carrier must be understood to contract with him only for his interest, upon such terms as he dictates in regard to the delivery, and that the consignee is regarded simply as an agent selected by the consignor to receive the goods at a place indicated. Where the carrier has no notice of the ownership of the property other than that implied from the relation of the parties to each other as consignor and consignee, the latter is the implied owner, and the carrier is justified in taking his directions as to the manner of delivery."

In *Southern Express vs. Dickson, 94 U. S. 549*, this Honorable Court held that, inasmuch as evidence was introduced and the jury found the ownership was in the consignor, and that the railway company had notice of it, the railway was not justified in taking the directions of the consignee as to a change of destina-

tion, but interpreting the cases cited to sustain the right of a consignee to change the destination, the Court said:

> "The numerous cases cited by the plaintiff in error, to the effect that any delivery to the consignee which is good as between him and the carrier is good against the consignor, are cases where the carrier has no notice of the ownership of the property other than that implied from the relation of the parties to each other as consignor and consignee. This gives to the consignee the implied ownership of the property, and hence justifies the carrier in taking his direction as to the manner of delivery."

Another case which seems to be on "all fours" with the cases at bar, is *London & Northwestern Railway Company vs. Bartlett, 7 H. & N., 400,* where wheat was held at the station by order of the consignee, instead of being delivered at consignee's mill, according to the contract contained in the bill of lading. It was held that the carrier was exonerated for injury to wheat caused by delay in the station, in the absence of knowledge by it that the wheat belonged to the consignor. The Court said:

> "It is, I think, quite clear that the consignee of goods may receive the goods at any stage of the journey, and I think that if the consignor directs the goods to be delivered at a particular place, it is a contract to deliver the goods at that place and not elsewhere. The contract is to deliver the goods there unless the consignee shall require them to be delivered at some other place."

Other cases were those of *Mitchell against Ede, 11 A. & E. 888; Foster against Frampton, 6 B. & C., 107,* which are decided on similar principles. Among

the cases discussed by the Court in *Southern Express Company vs. Dickson, 94 U. S., 549,* was the case of *Sweet against Barney, 23 N. Y., 335.* where a package of money was sent by express directed to "The People's Bank, 173 Canal Street, New York, City." The package was delivered to an agent of the People's Bank at the express office, and was stolen from him. It was held that the delivery exonerated the express company from responsibility, since it had no notice that the money was not the property of the bank, the consignee.

Applying the above doctrine, the question to be determined is, did the carrier have notice that the consignor, and not the consignee, was the owner of the goods? No! There is no conflict in the evidence. The intervening petitioners themselves testified that they in no way notified the carrier that they were the owners of the goods. (R pp. 293, 297, 303, 310, 314. 318.)

The evidence of the consignees above, on stipulation, as to free storage by the Terminal Association, is fully confirmed, as will presently be seen, by that of other witnesses who were sworn in the cause in behalf of the receiver, and closely cross-examined.

The practical effect of such evidence is to strongly and conclusively establish an agreement between the consignees, either as owners, or as agents of the own-

ers, and the Terminal Association, by which the latter was to act as warehouseman, in taking and storing the goods of the former upon their arrival and deposit on the tracks of the latter at East St. Louis.

The reasonable presumption that also arises upon the face of such evidence is that the duty of the receiver, as a common carrier, had been fully performed when the cars and their contents had been hauled to the end of the receiver's rails, and set to the designated "Y" tracks of the Terminal Association at East St. Louis, subject to the full control of the consignee.

Setting the cars thus to the designated "Y's" was delivery to the consignees or their agents, the Terminal Association, just as much as if the cars had been set to or unloaded in a previously designated warehouse.

Such evidence also shows the motive and consideration influencing the Terminal Association to store the cars on its tracks at East St. Louis, free of charge, *to be the tolls arising from the control of future transportation*, upon reassignment to a fresh destination, either to the purchasing breweries across the river in St. Louis, or the various brewers on the east bank of the river.

And these propositions are all consistent and fall into line with the dominant fact, clearly shown in the record, that the barley was either bought by the said

grain brokers, the consignees, for re-sale, or was consigned to them for sale for account of the owners and consignors, and for their convenience, and to save storage and expense or re-loading, was to be held in the original cars, on the tracks of the Association in its yards in East St. Louis, *awaiting market*, and when re-sold and properly re-consigned was to be sent forward by the Association in the same cars, under new way bills, to the consumer.' And with the further fact, stated above, that East St. Louis was the "port of entry" and resale for that class of goods for St. Louis and adjacent territory.

(c) The transit under the original contract of carriage had therefore ended.

The remarks of Justice Davis, *Railway vs. Mfg. Co., 16 Wallace, 318*, relied upon by opposing counsel, were made in reference to goods *in transit*, where, as incidental to the delivery to a connecting carrier, storage was necessary. They have no application to a case where the goods had arrived at their final destination, and had been turned over to a warehouseman ready to be delivered to the consignee, or subject to his full control, to await, at his pleasure, resale, distribution and a new contract of carriage. In fact, this very distinction is made by Mr. Justice Davis, when he says:

> "It is *argued*, however, that there is no difference between goods to be delivered to their owner at their final

destination, and goods deliverable to the owner or his agent for further carriage; that in both cases, as soon as they are 'ready to be delivered' they are 'awaiting delivery.' This position, although plausible, is not sound. There is a clear distinction in our opinion between property *in a situation to be delivered over to the consignee on demand*, and property *on its way to a distant point*, to be taken thence by a connecting carrier. In the *former* case it may be said to be *awaiting delivery;* in the *latter* case, *awaiting transportation.*"

The phrase "awaiting transportation" has reference to the delay at some *intermediate* point of the *original* contract of carriage, and not, as in this case, to storage, for the benefit of the consignee, at the *destination* named on the original way-bill and while awaiting distribution and a *new* transportation under a new contract of carriage.

That the consignee, instead of unloading the grain as he might have done, preferred to sell it in bulk and then reconsign and reship it in the same car to the purchasing consumer, does not in the least change the fact that the cars, in these cases, were subject to the full control of the consignee, and that they were neither "awaiting delivery" nor "awaiting transportation," but were "awaiting market" and from the moment of their deposit in the place designated and required by him in the usual course of his business, delivery as well as carriage was complete.

It will be found that all the cases cited by opposing counsel on this point have reference to goods at an *intermediate* point of the original carriage, and not to goods which have arriven at their *destination.*

It is said to be sometimes a matter of nicety to decide whether the bailee is acting in the capacity of forwarder or carrier and in what character he may be chargeable with loss. ***Teall vs. Sears*** *(9 Barb. N. Y. 317)*. Opposing counsel have failed to grasp or observe the distinction. The rule applicable to the circumstances of this case is well and clearly stated in ***Ladue vs. Griffith***, *25 New York 36*:

> "When a person is both carrier and warehouseman, it is well settled that if the deposit of the goods in the warehouse is a mere accessory to the carriage, and not subject to any particular order of the owner, or if they are deposited for the purpose of being carried further, the responsibility of the party having them in charge is that of a carrier: *Angell on Carriers, Sec. 133; and Blossom vs. Griffin, 13 N. Y. 569, 572*). But when goods are deposited in a warehouse subject to the further order of the owner, the case is otherwise. In such case, as Judge Buller said, in *Garside vs. Proprietors of Trent and Mersey Navigation Company, 4 Term Rep. 581:* 'The keeping of the goods in the warehouse is not for the convenience of the carrier, but of the owner of the goods. In such case, the rights and duties and responsibilities of warehousemen would attach to the person having the goods in store.'"

> See also *Platt vs. Hibbard 7 Cowen (N. Y.) 499.*
> *Northern Indiana R. C. vs. Shurtz, 7 Mich .525.*
> *Montgomery vs. R. R., 339 Ill. 335.*

The way bills introduced in evidence *by the petitioners*, show conclusively that the original contract of carriage was from points of receipt on the line of the initial carrier to East St. Louis, with the exception of five cars numbered 46064, 10071, 34908, 10536 and 3218, which show "Lake City to St, Louis." (R. p. 247).

That this absolutely controlled the movements of cars and established beyond question that their destination was East St. Louis, as therein indicated, is shown on the cross-examination of petitioners' own witness, W. E. Beacham. (R. p. 131).

> Q. "Taking this car No. 68, about which you have been questioned, I will ask you upon which of these papers the C., P. & St. St. L. or Jacksonville & Southeastern Railway would handle the car at East St. Louis or at the destination?
>
> A. "Car 68 would be handled on this paper, which is a way-bill.
>
> Q. "Now I will ask you to look at that way-bill and name *point of delivery and the destination;* the point of receipt and destination of that car, reading from the way-bill itself?
>
> A. "This is a way-bill reading from Wykoff, Minnesota, *to East St. Louis.*"

Again, their leading and by far their most important witness is George W. Phelps, the agent of the Terminal Association at East St. Louis, whose testimony shows throughout the greatest zeal in aiding the counsel for the petitioners in the effort to shift the burden of liability from the Association to the receiver. On this same point, it is important to note that his testimony is in exact accord with that of Beacham, quoted above. On cross-examination, he testified as follows:

> Q. "I will ask you whether in point of fact that way-bill does not also show the initial point at Wycoff, Minnesota, and terminal point at East St. Louis?
>
> A. "The way-bill is headed East St. Louis; yes, sir.

Q. "What is that for? What does it mean?

A. "That way-bill?

Q. "Yes, sir."

A. "*Instruction to carry the car to EAST ST. LOUIS over those lines.*" (R. p. 136.)

East St. Louis being the end of the transit, none of these original way-bills were ever passed on to the Terminal Association; but the bills referred to as going to the Association were, in every case, the entirely *new* bills creating a new contract of carriage, showing East St. Louis as the point of origin, and some other point as the new destination. Not only this, but the way-bills referred to as *going to* the Association, were *actually Terminal Association way-bills*; filled in on Terminal Association blanks, and showing the new carriage from a point on the Terminal Association rails. And as to which the receiver sometimes acted simply as the accommodation agent of the original consignee; and not either as carrier or warehouseman. (R. pp. 132-136, 211-222; Exhibit "L" 140.)

In addition to this positive evidence, we find the further fact that the initial carrier, the St. Paul Company issued through its way-bill, and indicated thereon the various carriers which it was intended should handle the shipment, namely the "R. I. & P. and J. S-E," the latter being the name by which the Peoria Company was commonly known. East St. Louis, besides being the storage and distributing point for the barley, is the

terminus of the Peoria Company, and if it was originally intended to have the shipments carried through to St. Louis, the Terminal Association would have appeared on the way-bill as the last connecting carrier. (R. p. 253.)

As the Supreme Court of the United States says in *St. Louis Ins. Co. vs. St. Louis R. R., 14 Otto, 146:*

> "that in the absence of an express contract, each connecting carrier only undertakes to haul to the end of his rails."

East St. Louis was the end of the Receiver's rails, and was the destination in the way-bill which came along with the cars. No connecting carrier was indicated in that way-bill to which the receiver was to deliver the cars *as a connecting carrier*, and everything points to the fact that East St. Louis was the destination on this original contract of carriage. When delivery was made to the Terminal, it was as a warehouseman to hold the goods for the convenience of and subject to the orders of the consignees.

It is claimed that the station receipts offered in evidence by the petitioners contain under the head of "marks and consignees," *not under the head of "destination,"* the name of the commission broker, with the words "St. Louis." In addition to the reply we will hereafter make to this, we desire to call the Court's attention to the fact that petitioners admit these station receipts were not

issued at the time of the shipment of the goods, but were executed *after the loss.* If they can be said to differ from the way-bills in the particular as to the point of destination, which is entitled to the greater weight? Opposing counsel admit that petitioners procured those receipts *after* the fire *for the purpose of presenting their claims.* (Brief, pp. 56–7). The way-bills were issued at the time of the shipments, and are contemporaneous with them. Surely the latter are the better evidence of what the contracts were, viz: *to transport the grain to East St. Louis.*

If East St. Louis was the destination, the transit had ended, and whoever held the cars and contents, held them at the most as a warehouseman.

Whether St. Louis or East St. Louis was the destination, the record shows conclusively that the "Ys" of the Terminal Association were the designated place of deposit for this class of freight. We submit, therefore, that if East St. Louis was the destination, the freight had been delivered to the Association as the agent of the consignee; and if St. Louis was the destination, the cars had been delivered to the Association as the next succeeding connecting carrier, by the placing of the cars at the designated place of deposit.

W. H. Calvert testifies in behalf of the Receiver (R. p. 207):

> Q. "As the cars came over the C., P. & St. L., I will ask where the deposit is, or was, so far as the engine is concerned, and the immediate control of those cars by the engine?
>
> "A. "On these 'Ys' that come right round here.
>
> * * * * * * * * *
>
> Q. "I will ask you if those 'Ys' *are the designated place of deposit* as between the Terminal Railroad Association and the C., P. & St. L?
>
> A. "Yes, sir; that is as far as our trains go."

Again, at page 211, we find this testimony:

> Q. "I understood you to say the place of deposit of cars coming in was on these 'Ys' you have marked?
>
> A. "*So far as we are concerned;* the C., P. & St. L.
>
> Q. "After the consignee had been heard from, either directly to you or through Roederer, or any other agent of the Terminal Association, or whatever source, did the C., P. & St. L. Company ever tie on to them again?
>
> A. "No, sir.
>
> Q "Did you, as chief agent of the receiver at East St. Louis, have any control or direction as to the particular track in the yard of the Terminal Association upon which the cars were to be deposited and placed?
>
> A. "No, sir.
>
> Q. "*Who directed that and controlled it?*
>
> A. "*The Terminal Railroad Association.*"

The receiver also swears that the "Ys" were the designated place of deposit (R. p. 222):

> A. "That is the place where all of our deliveries were made to the Terminal Association; our engine would pull the train into these 'Ys' and their switch engine would take it from there.

Q "Who had the care, custody and control after you delivered them on these 'Ys'?

A. "The St. Louis Terminal Association, unquestionably."

The foregoing evidence is consistent with and is strongly supported by the testimony of George H. Phelps, local agent at East St Louis for the Terminal Association, and the principal witness for the interveners (R. p. 74).

Q. "The train comes in on this 'Y'; what is then done with it by the receiver, if anything?

A. "The train stops on the 'Y' and the receiver is done with them."

See also (R pp. 184, 185, 188, 189).

In *Converse vs. Transportation Company, 33 Conn., 166*, a railroad company and a steamboat had a covered wharf in common, at their common terminus, used as a depot and a wharf; and it was the established usage of the steamboat company to land goods for the railroad. on the arrival of its boats in the night, at a particular place in the depot, whence they were taken by the railroad company, *at its convenience*, for further transportation, both companies having equal possession of the depot. There was no evidence of an *actual* agreement that the cars deposited were in the possession of the railroad company, and the goods in question had not been in the *manual* possession of the railroad company, when they were destroyed by fire on the Sunday afternoon following

their deposit on the previous night. It was held in that case that there was a tacit understanding that the steamboat company should deposit their freight at that particular spot, and that the railroad company should take it thence at their convenience. *The delivery to the succeeding carrier was held to be complete*, and a recovery against the first carrier for the loss of the goods was reversed.

In *Merriam vs. Railroad Company, 20 Conn., 354*, it was held that if a common carrier agreed that property intended for transportation by him may be deposited at a particular place without express notice to him, *such deposit alone is a sufficient delivery*, and that such an agreement *may be shown by a constant practice and usage so to receive property without special notice.*

Both of the foregoing cases are approved as authority by the Supreme Court of the United States, in the case of *Pratt vs. Grand Trunk, 95 U. S., 43.* See also: *Truax vs. Phila. R. Co., 3 Houst (Del.) 251.*

(d) **Unable to contradict the fact of actual delivery to the Terminal Association, petitioners seek to avoid its effect by a technicality.**

There seems to be no question of the fact that, at the time of the fire, the Terminal Association had the exclusive *actual physical* possession, custody and control,

but to avoid this, opposing counsel rely on a pure technicality, namely, that there had been no delivery of a way-bill. The delivery of a way-bill would simply constitute a *constructive* delivery of the cars, as between the two carriers, a formality which could in no way concern a third party, who would have the right under the contracts of carriage in this case, to sue the carrier having the *actual* custody.

Elsewhere herein we show that the issuing of a way-bill is not necessary to constitute a delivery, that it is simply evidence of the same; and that an actual delivery may be shown by other competent evidence.

Opposing counsel insist that the receiver testified:

> "That, until the Terminal Company got the way-bills, it would not move the car, and that the car would be held until it received the way-bill, *or got instructions* from the receiver's agent; and that until a way-bill was delivered *or instructions given*, the car was subject to his orders."

We do not believe it was the intention of counsel to misquote the testimony, but the record shows that the receiver testified directly to the contrary:

> A. "I don't understand we had any control over them; *if it suited their* (the Terminal) *convenience to move them into the other corner of the yard they would have done so.*" (R. p. 228.)

So much as to moving the cars by the Terminal Association, while they were in storage. When the grain had been sold on the market, and the original consignees were ready to give the grain a fresh des-

tination, of course it was necessary for the Terminal Company to have "instructions," which often came direct from the consignee to the Terminal, but usually through the receiver, acting as the accommodation agent for the new consignor.

> Q. "Wouldn't have moved them to their *destination* until they got a way-bill?
>
> A. "Not till they got *instructions*?
>
> Q. "They would still be held there?
>
> A. "Yes, sir.
>
> Q. "So they were subject to your order to that extent?
>
> A. "Yes, sir." (R. pp. 228; 135-136.

So it is to be plainly seen that during the period the cars were in storage awaiting sale and fresh destination, the Terminal had exclusvie physical and actual custody as to that storage, and it was only as to a fresh destination that instructions were to be given. During the period of storage the Terminal acted as a warehouseman. The moment it received "instructions" as to the fresh destination, it entered upon the performance of the duties of a common carrier. We submit that this is the only fair interpretation of the testimony.

In this connection it must always be borne in mind that the instructions came from the original consignees, and were to be inserted in the blank way-bills—not of the Peoria Company, *but of the Terminal Association.*

Opposing counsel are compelled to ignore entirely the fact that these cars were received by the Terminal Company in behalf of the consignees for the purpose of storing them at East St. Louis for re-sale, and base their argument that a bill of lading or way-bill is necessary to constitute a delivery, on the theory that the cars were *in transit*, and were not to remain at East St. Louis, subject to the control of and until the original consignee had made a sale, and was ready to enter into a new contract of carriage and give the Terminal "instructions" as to the new or fresh destination. (R p. 135.) It was entirely at the option of the consignor whether the cars should be unloaded at East St. Louis or be re-billed elsewhere. No right of initiative or control whatever remained in or was vested in the receiver.

We find that opposing counsel have attempted to argue the actual possession of the cars as being in the receiver, on the theory that they were in his portion of the Terminal yard at the time of the fire. This is almost as strained as the ***constructive*** delivery by way-bill. This theory, that the receiver had possession of a portion of the Terminal yards, is supposed to have its origin in the contract between the Peoria Company and the Terminal, which provided that the latter should furnish the necessary yard room and track facilities in their yards at East St. Louis. (R. p. 100.) But what for? For the Terminal to carry out an

agreement *it* had entered into with these consignees to store their grain? Not by any means, but as the contract recites, to "properly take care of and handle the business of the *party of the second part*, viz: the Peoria Company. This contract was not to enable the Terminal to handle *its* business The record clearly shows that the storage of this grain was the Terminals, business, in order to secure control of future transportation, and no concern of the receiver after the cars had been "set to" the Terminal's tracks.

Mr. Phelps, a representative of the Terminal, makes this very plain, when he testified (R. p. 79):

> Q. "Was the service rendered by the Terminal Association, in breaking up the train of the receiver when it came in on the 'Y,' and placing the cars on these tracks marked red, a *separate and distinct service* from the work you did after receiving the way-bills?
>
> A. "*It was a separate and distinct service.*
>
> Q. "Explain how and why.
>
> A. "We received for this service, *taking care of the cars*, for which we had a way-bill a *separate revenue.*
>
> Q. Separate from what?
>
> A. "*From making and breaking up trains.*"

Can there be any question, then, that this "separate and distinct service" of "taking care of the cars" for which the Terminal received a "separate revenue" was being rendered pursuant to the agreement with the consignees to hold and store their cars until they should name a fresh destination?

That this storage was part of the business of the Terminal, and one of the great inducements it held out for the purpose of procuring the "initial haul" on re-sale and re-consignment, is conclusively established by the testimony we discuss hereafter in this brief.

It was also attempted to be shown on the trial, that the tracks upon which these cars were, at the time of the fire, had been allotted to the receiver. This wholly failed. Mr. Stapleton, agent for the receiver, tesfified (R p. 183):

> Q. "Now as to the cars stored on the tracks, were there any other cars or property than that of the C., P. & St. L. upon the tracks next to the warehouse?
>
> A. "Yes, sir.
>
> Q. "How were the tracks used; exclusively for the business of the C., P. & St. L.?
>
> A. "No, no; never has been so.
>
> Q. "Who used them?
>
> A. "The Terminal Association used them and we used them; in fact, we never had any rights.
>
> Q. "Did you have any control or direction as chief clerk in the office (of the receiver) as to the particular place of deposit of cars brought in by the C., P. & St. L.?
>
> A. "No, sir.
>
> Q. "Did anybody in your office?
>
> A. "No, sir.
>
> Q. "Who managed as to place of deposit?
>
> A. "The Terminal Association.
>
> *Cross-Examination.* (R. p. 187).
>
> Q. "These tracks, I understand, in the immediate vicinity of the warehouse, were not exclusively used by the C., P. & St. L. trains?

A. "No, sir.

Q. "But commonly for setting cars in there?

A. "*Just as the Terminal Association saw fit;* put our cars there if they saw fit."

John Weidmer, of the Gratiot Street Warehouse Company, testified that he rented of the Terminal Association a warehouse which was right in the middle of that part of the Terminal's yards, which opposing counsel refer to in their brief as the receiver's "portion" of these yards; that some of the tracks ran through the warehouse; and that he rented from the Terminal on the understanding that it had full control. (R. pp. 195, 196, 197).

The utter absence of any such control of tracks or yard or any portion thereof is also fully shown in Judge Showalter's opinion, hereafter quoted.

Opposing counsel make the same argument in reference to "junction reports" as to the delivery of a way-bill. Our reply also is the same. Junction reports are used by carriers to notify the owners of cars that they have passed from one carrier to another. They do not constitute delivery, and if delivery was actually made, a failure to send a junction report can not operate to *draw the car back.*

To show how utterly immaterial this act of delivering a way-bill or sending a junction report is to the actual delivery of the cars, let us place the "shoe on the other foot," and ask the question: "If there

had been a new way-bill issued but no actual physical delivery of the cars, would this Court hold the party to whom the way-bill had been issued responsible for the care, custody and control of the cars?" The answer to this is found in *Missouri Pacific vs. McFadden, 154 U. S., 155*, where this Court said:

> "All of these allegations in the answer were, of course, admitted by the exception, and, therefore, the case presents the simple question of whether the carrier is liable on a bill of lading for property which, at the time of signing of the bill, remained in the hands of the shipper for the purpose of being compressed for the shipper's account, and was destroyed by fire before the delivery to the carrier had been consummated. The elementary rule is that the liability of a common carrier depends upon the delivery to him of the goods which he is to carry."

Continuing further, the Court, quoting from *King vs. The Lady Franklin, 8 Wall, 325*, speaking of a bill of lading, says:

> "It is an instrument of a two-fold character. It is at once a receipt and a contract. In the former character it is an acknowledgement of the receipt of property on board his vessel by the owner of the vessel. In the latter it is a contract to carry safely and deliver. *The receipt of the goods* lies at the foundation of the contract to carry and deliver. If no goods are *actually* received, there can be no valid contract to carry and deliver."

And continuing, the Court thus characterizes that rule:

> "The rule thus stated is the elementary commercial rule. Indeed, in the case last cited, the Court expressed surprise that the question should be raised. This view coincides with the rulings of the English courts."

See also: *Lake Shore vs. Live Stock Bank, 178 Ills., 518;*
California vs. Compress Co., 133 U. S., 387;
St. Louis Co. vs. Ins. Co., 139 U. S., 223.

(e) The carrier was not required, in the usual course of business, nor expected, to remove the freight from the cars.

The evidence on this point is clear that it was the custom established by these very consignees, for their own benefit, to permit these barley shipments to stand in the yards of the Terminal Association at East St. Louis, from two hours to four weeks or more. The reason for this was plain. The consignees were brokers; they were not consumers. They acquired the grain to resell. If the grain arrived before they had made a re-sale, or if the "market" did not suit them, it was necessary to store it some place, and by arrangement with the Terminal, by which the latter made sure of its "bridge toll" or "initial haul, a place of free storage was designated on its tracks in its yards in East St. Louis as a convenient distributing point to consumers on both sides of the river. It would have been not only inconvenient for the consignees to remove the grain from the cars, but would have also caused great and unnecessary expense and delay, inasmuch as they themselves had no perfect control over the date of reshipping the barley, as that depended on the state of the "market." So it was greatly to their advantage to keep the grain in the cars ready to receive a fresh destination at the very moment they could make a sale. The evidence which establishes this custom, and which is uncontro-

verted, is found in the testimony of W. H. Calvert, the agent of the receiver at East St. Louis, which we quote (R. p. 231, 232), and which shows that this custom has existed since the winter or early spring of 1891.

> Q. "You stated yesterday in the course of your examination as to these barley shipments coming to us over the Chicago, Milwaukee & St. Paul railway, and probably as to certain other classes of property, the shipments in question were permitted to stand in the yard at East St. Louis, all the way from two hours up to four weeks or more. I will ask you to explain how this happened.
>
> A. "Well, the class of freight allowed to stand there consists of grain (barley in particular) hard coal, pig iron and salt, and other commodities that are held on what we term the market; in other words forwarded there (not in all cases, but as a rule) and held for the accommodation of the consignee; which is virtually for the interest of the shipper; the barley being held on commission to await an advance in the market. In other words, it comes in there, and if the market is all right when it arrives they sell it immediately, but as a rule hold it until the market suits them. *It is, in other words, a port of entry for that class of goods at St. Louis.*
>
> Q. "And is held to await the state of the market for the accommodation of the consignee?
>
> A. "For the accommodation of the consignee, which is virtually accommodation to the owner, it being handled on commission.
>
> Q. "How long has this barley business been carried on, and how long had that custom of shipment been in operation at St. Louis?
>
> A. "Well, since the C., P. & St. L. opened business in East St. Louis, which was in the winter or early December or January, 1891."

We also refer to the testimony of the same witness at R. pp. 210-11.

In further corroboration we quote also from the testimony of E. R. Stapleton, Chief Clerk of Calvert, as follows: (R. p. 189).

Q. "Do you mean to say that the receiver had control of these cars so far as placing them is concerned, or handling them?

A. "So far as placing them or handling them he did not.

Q. "Now, I will ask you whether cars billed, say from Wykoff, wherever that may be, to East St. Louis, with a memorandum on the face of the way-bill which stated the name of the consignee in St. Louis, whether the C., P. & St. L., when it delivered the cars at these yards in East St. Louis, had hauled them as far as they contracted to haul them?

(Objection.)

A. "They had. The destination of St. Louis on the bill cuts no figure in the matter whatever; the cars are brought in there and held, and the consignee is served with a regular notice.

Q. "Then it is the consignee directs?

A. "The consignee directs where he wants them; a large portion go to Belleville or Highland or Hines Brewery—to different places.

Q. I will ask you whether or not the way-bill as to barley shipped on which you had had the name of the consignee in St. Louis, was conclusive as to the ultimate destination of the car?

A. The barley shipment? By no means, whatever.

Q. What became of it after placing it on the 'Y'?

A. It would be hard to answer that question, because it goes to a thousand different places.

Mr. Hanson: In St. Louis?

A. St. Louis and East St. Louis both: no general place.

Q. Is this barley, any of the barley received from the C., M. & St. P. prior to the date of the fire, and about which he has offered some memorandum way-bills and so forth shipped to other points—East St. Louis?

A. Prior to the fire?

Q. I speak of prior to the fire.

A. Oh, yes.

Q. Who controlled as to the precise and definite point where it should be delivered?

A. The consignee in all cases.

Q. Then I will ask you what the custom was as between the C., P. & St L. and the Terminal Railroad Association as to the further direction and final destination of the cars.

A. The cars would come in and be placed on the tracks in the Terminal Association yard wherever they saw fit; we would take the way-bill and notify the consignee that we had a car numbered so and so and loaded barley, 'where do you want it?' That is about the substance of the notice. And at such time as he got ready he would send this notice back, endorsed on the back, a great many times, send this car to Hines' Brewery or send it to Highland or some other point. Then we take and make out a way-bill; take that to Mr. Phelps and take his receipt.

Q. Was that a different and separate transaction having reference to the original contract between the shipper and the C., M. & St. P.; was it a new arrangement the consignee directed and controlled, or was it the original arrangement named by the shipper?

A. A new arrangement by the consignee, who placed orders with us to hold his barley." (See also R. pp. 183-184.

Also the receiver, C. H. Bosworth: (R. P. 221.)

Q. "As receiver, I will ask you to state between what points you undertook to haul that barley, and between what points you were paid?

A. Peoria and East St. Louis.

Q. What point in East St. Louis?

A. It is difficult for me to state that. I should say in answer to that question that we can't haul it further than the end of our rails.

Q. Where is the end of your rails?

A. At the bridge junction, unless the stuff was expected to be delivered at our freight house or the yard tracks in connection, when it would be delivered to the Terminal Association.

A. I refer you to a certain blue print offered on behalf of the petitioners and call your attention to three certain 'Y' tracks, upon which it appears from the statement of Mr. Calvert, Mr. Phelps and others, these C., M. & St. P. and other cars hauled by you to East St. Louis were delivered, and ask you whether or not you exercised any right of control as a common carrier beyond these three 'Y's?'

A. That is the place where all of our deliveries were made to the Terminal Association, our engine would pull the train into those 'Y's' and their switch engine would take it from there.

Q. Who had the care, custody and control after you delivered them on these three 'Y's?'

A. The St. Louis Terminal Association, unquestionably.

Mr. Hanson: That is, that is your legal opinion?

A. No; they actually had the cars and custody of the cars; we had no agents to attend to the movement of them, or no engines.

Q. What did the bills of lading say?

A. From Wykoff to East St. Louis with the name of the consignee in St. Louis.

A. I should say that without any special understanding or knowledge about the business, our agent would have naturally taken the cars or had them eventually brought on the transfer tracks, which would be near our freight house in East St. Louis. It was known in all these cases the cars were subject to movement by rail by some railroad company and put in this yard convenient for that additional movement.

Q. Was that seperate and distinct, or was it a part of the original contract by which you undertook the freight?

A. I should say not a part of the original contract; the contract provided for the transportation to East St. Louis. We have fulfilled that part of it, and we had discharged our obligation."

Also Henry Rippe, one of the interveners (R p. 305.)

Q. "Upon receipt of this letter did you instruct your agent not to allow the shipments to be held in East St. Louis?

A. I do not think I did.

Q. What did you do upon receipt of the notice contained in this, to-wit: 'All your shipments come via J. S-E. R. R. into East St. Louis and are held there until disposition is given them, and they pay the transfer,' in regard to instructing your agent?

A. I don't think I wrote them anything; I left it to their mode of doing business; I could not tell them what to do down there.

Q. You allowed them to handle that end of the business?

A. Yes, sir."

That the storage of the cars was for the convenience of the consignees and was accessory to re-sale and future transportation and not to the original contract of carriage, conclusively appears, as we think, from the long period the cars were permitted to stand on the tracks in the Terminal yards. Twenty-four hours is the customary and usual limit of storage accessory to and while "awaiting delivery," and even shorter periods for delays at intermediate points, when "awaiting transportation," incident to through contracts of carriage.

But the delays in the Terminal yards at East St Louis were absolutely inconsistent with either theory.

The cars mentioned in schedule "C" (R. p. 102) remained from one to seven weeks; two of the cars from about September 22d to November 1st, and out of twenty-six on the list eleven of them remained for an average of one month. The cars in controversy, Exhibit 6, as found by Judge Woods in the opinion of the Court of Appeals (R. p. 342) had been on the tracks of the Terminal Association at the time of the fire (October 28th, 1894) which destroyed them, "one since the 28th day of September preceding," one for a period of eighteen days, and the others for periods ranging down from eighteen days to seven hours. Each and all of them subject not only to the careful notation on the records of the Terminal showing the exact hour of delivery, but subject likewise, to the daily inspection and tally of the consignees through their inspecting agents, in order to verify contents and to obtain "samples" for the purpose of re-sale on the "market." During this storage the cars were subject to the control and disposal of the consignees, and were in the exclusive custody of the Terminal.

(f) No particular place of delivery was designated by the contract of carriage.

This must be conceded in any view that is taken of this case. It makes no difference whether the des-

tination was St. Louis or East St. Louis. There is nothing in the way-bills to indicate what place in St. Louis or East St. Louis delivery was to be made. By the way-bills the freight was to be forwarded from a certain point to East St Louis, and the name of the consignee and his residence, "St. Louis, Mo.." was also noted therein. The only other evidence of the contract of carriage is the delivery of the goods to the carrier, and the shipping receipt, which were given to the shippers after the loss occurred. As to place of destination, the shippers' receipt will be found as indefinite as the way-bills, as they name only the consignee and the city in which he resides, without anything as to the particular point in the city where the goods are to be delivered.

There is nothing surprising in this. The absence of a designated place of delivery in the contract of carriage is not the result of negligence or mistake, but from the very nature of the shipments it was the intention of the parties not to designate a place of delivery. The consignees were grain brokers. Their business was buying and selling, not consuming. It would not be reasonable, therefore, to presume that it was the intention of the parties to have bulk barley delivered at the place of business of the consignees. Especially in view of the fact, fully disclosed in the evidence, that the consignee, after re-sale, and as necessary, directed re-shipment and delivery to Heinz's

brewery, East St. Louis, or to Highland, or to Belleville, Illinois, or to the St. Louis breweries, for all of which places East St. Louis was the designated "port of entry."

None of them were on the receiver's line. Nor near it—not even Heinz brewery in East St. Louis. Highland was thirty miles out on the Vandalia railroad, Belleville fourteen miles out in St. Clair county, and the malthouses, in St. Louis, across the river in another state, miles away from the end of the receiver's rails, involving, in every instance, further transportation under a new contract.

(g) **Not only in the usual course of business, but also by special arrangement, the cars and their contents were placed on the tracks of the Terminal Railroad Association for the convenience of the consignees.**

That there was, in fact, an arrangement between the Terminal Railroad Association and the consignees to hold this grain in the cars on the tracks of the Terminal at East St. Louis, we have shown above by a reference to the stipulation of facts entered into and of record. And that these cars and their contents were held on the tracks of the Terminal for the convenience of the consignees, we have shown by a reference to the uncontradicted evidence of W. H. Calvert, his chief clerk, Stapleton, and by the letter of Orthwein to Rippe. Exhibit "G" (R. p. 308).

In the Court of Appeals, opposing counsel did not deny the existence of this agreement, but after having stipulated that the consignees would swear to it, sought to annul its effect by argument. They presented "three complete answers" to it. We quote from their brief therein filed:

> 1. "This barley was all consigned to either the Teichman Commission Company, St. Louis, or the Orthwein Grain Company, St. Louis, by way of East St. Louis. This is made certain by the stipulation between the parties of August 27, 1895, hereinbefore referred to: and had the witnesses been present and testified as stated by the counsel, their testimony would not have changed the effect of this stipulation, as to the destination of the barley."

We submit that the testimony of these witnesses does not change the effect of the stipulation referred to, since, as we have heretofore said, there is a radical difference between the person to whom a shipment may be "*consigned*" and the place to which it is *destined*. But if it be admitted that the original destination was St. Louis, these witnesses were the consignees and *had the right to change the destination to East St. Louis, and did so.*

The second "complete answer" was:

> 2. "The consignees of the barley in question had no authority to bind the shippers, who were the owners, to any such arrangement."

This is a statement of law for which no authority is cited, nor can any be found. On the contrary, the law is well settled that the consignees had the un-

doubted authority to make the arrangement by which the destination was changed to East St. Louis, and the cars there held for a fresh contract of carriage.

(This brief *ante*, for authorities).

Not only is this second answer without foundation in law, but it is also utterly without foundation in fact, as will appear from the testimony of one of the shippers, Mr. Rippe, quoted above, to the effect that the method of handling this barley business at East St. Louis was left entirely to the consignees.

The third "complete answer" of opposing counsel was so complete that it answered itself. They argued that:

> 3. "until there had been a delivery * to the Terminal, it could not hold possession of it for the consignees. This is made clear from the testimony of Mr. Stapleton * * from which it appears that the custom was for him to notify the consignees of the arrival of the barley and ask them where they wanted it, *and upon* receiving this information, he would then make out a way-bill, deliver it to the agent of the Terminal and take his receipt."

It is well settled, however, that a carrier is under no obligation to notify a consignee of the arrival of the goods and if the consignee does not appear to accept them the carrier may place them in storage at the consignee's expense and risk. With this in view, the question naturally arises, what was done with the goods between their arrival at East St. Louis and the

issuing of the new way-bill upon the order of the consignee. The reply is found in opposing counsel's "third complete answer," where they stated that:

> "until the consignees knew that the barley had arrived at East St. Louis, and the same had been delivered to the Terminal Association, they could not and would not give that company further orders for re-shipment."

Thus showing conclusively that even opposing counsel recognize that it was customary to *make a delivery* to the Terminal, and *after* such delivery had been made for storage, to notify the consignees, and then take their instructions for a *new contract of carriage* to a *fresh destination*. Is it not a little significant that these instructions, or "further orders for re-shipment," *were often sent direct to the Terminal?* (R. pp. 192-3.) But never until the property had been re-sold; and new shipping orders were always incident to and dependent on such re-sale, and not at all on the receipt of notice of arrival from the receiver.

These notices, then, amounted to nothing more than advising the consignees that their barley was in storage with the Terminal, awaiting their convenience for a sale and fresh destination? Was the receiver under any legal obligation as a common carrier, to send them? Surely not. The sending of these notices did not deliver the cars, and if the cars had actually been delivered, the *Terminal Railroad should not be permitted to escape liability for their care*, simply

because the receiver had not continued to advise the consignees that their goods were where they had arranged to store them. However, the testimony shows that it was the custom to notify these consignees, (R. p. 190-1) and the presumption follows that they were notified. *Hempstead vs. New York Central, 28 Barb. 485.*

On this point, the finding of facts by the Court of Appeals, as stated in its opinion, is most persuasive, if not conclusive:

> "It is not reported (by the Master) that the consignee of any car was not notified by the Receiver, and did not otherwise have knowledge before the fire that the car had arrived and was upon the Terminal tracks, subject to his order. On the contrary, the proof is that the consignees received from the shippers immediate notice by mail of each consignment and, in addition, received a sample of the grain, which, according to the (Master's) report, the shippers were accustomed to send by express. Informed in this way of the number and contents of a car in transit, the agent of the consignee, in regular and daily attendance in the yards for that purpose, was able to take and, there being no evidence to the contrary, presumably did take, the required sample from each car promptly upon arrival. This conclusion is fortified by a letter of the Orthwein Grain Company to one of the interveners, in which it is said: 'two of your cars (giving the numbers) arrived this afternoon,' and by the testimony of Rau to the effect that his consignee had possession of samples of his grain taken from the cars on the day of their arrival at East St. Louis. The proof, in addition to the facts stated, being that notice of the arrival of cars was regularly and promptly sent to the consignees by the employes of the receiver, the fair inference in the absence of contrary evidence is that notices of the arrival of the cars in question were sent and were duly received by the consignees." (R. p. 344).

We add, if they had not been, opposing counsel would have had them so testify.

(h) Petitioners abandon the position assumed in the lower courts.

Abandoning the argument by which they attempted, in the lower courts, to nullify this agreement between the consignees and the Terminal, they now take a new position, viz: that at the time the testimony was admitted they

> "had no thought, and not until it was argued in opposing counsel's brief on these appeals *did it ever occur to us*, that it could or would be *contended* that this informal stipulation, made in the hurry of and for the purpose of expediting a hearing, would or could be construed in such a manner as to cover cars while they were yet standing and being held on tracks used by the receiver, under his agreement with that Association, and when they had not been way-billed to that Association, and it did not know and could not know until such way-bill had been delivered that the cars contained barley, or what they contained. Especially when the Receiver's agent had, before the statement of counsel had been made, testified positively, and at the instance of counsel for Receiver, that these cars were held by the Receiver on these tracks on orders placed with him by the consignees to hold their barley." (Brief, p. 31).

If the Association, in view of its free storage business, on consideration of "bridge toll," or control of future transportation, and in further view of its own direct agreement with the consignees, and its custom of making a record of each car on its being set to the designated "Ys," and of the daily inspection, in the yards, for "samples," requiring, of course, that the

cars should be opened, and of the days and weeks they were held in the yards, did not know that they contained barley, and who it belonged to, and all about it, its agents, to say the least, were phenominally stupid.

Besides, if this agreement did not apply to the cars when they were burned, it surely would have been irrelevant and immaterial. But opposing counsel made absolutely no objection to its introduction on these or any other grounds.

For what purpose did opposing counsel think this agreement was introduced, if not for the purpose of "contending" that it covered these cars, *since they were the only cars in controversy?* We can see how the agreement might have been a shock and surprise to counsel when they came to give it mature consideration, but we do not see how it can avail them to say that they did not realize the purpose for which it was introduced, nor how they can thus avoid its effect.

(i) The agreement for free storage is an established fact.

In opposing counsel's brief, it is attempted to belittle this testimony by referring to it as "the statement which counsel made" and as the statement of what counsel "expected to prove by certain witnesses," with the accent on the word "*expected*."

They seek, also, at page 15 of their brief, to discredit the agreement by calling it a "pretended arrangement."

The existence of this agreement is an *established fact*, if the testimony of four intelligent witnesses, testifying as to their own acts and doings, can be said to establish any fact in a legal controversy. Opposing counsel admitted it in evidence without objection, and did not attempt to rebut it. Indeed, it was at their own instance that the stipulation, admitting the evidence as to the agreement, was made. We submit that it does not now become them to use language insinuating it to be a fiction. We had the promise of the consignees that they would attend and so testify. We relied on their attendance. They were outside the jurisdiction of the court and could not be compelled to attend. Not until the day before the hearing did these consignees inform our St. Louis agent that, *at the request of counsel for the Terminal Association*, they would not *voluntarily* testify.

We would have compelled them to testify (by deposition) if opposing counsel had not admitted our statement of what we "expected" to prove by them. It may be that counsel thought a ready admission on their part would make the testimony less effective than it would be were they to fight it stubbornly by cross-examination with no hopes of breaking it down,

or denying it on rebuttal. In fact, they did succeed in making the master overlook it entirely. But that did not take it out of the record.

Independent of the agreement between the Terminal and the consignees and of the stipulation establishing it, the record discloses other instances where the Terminal, for the sake of controlling future transportation, held itself out as a warehouseman and offered free storage as an inducement These instances, upon examination, will be found to fully establish and corroborate the existence of such an agreement as that shown in the record and covered by the stipulation.

(j) **Free storage was in fact one of the chief inducements which the Terminal offered to secure business as against its competitors and to procure shipments down the east side of the Mississippi River to East St. Louis.**

The greater portion of opposing counsel's brief is devoted to this effort to explain away and invalidate the testimony of the consignees as to their agreement with the Terminal for the storage of the barley as embodied in the stipulation of counsel. It will not only be of interest, but it should dispel any doubt which counsel have attempted to create as to the application of such testimony, for this court to be in-

formed that the record shows conclusively that the Terminal offered "free storage" facilities as one of its greatest inducements to obtain business which would otherwise have gone to its competitors.

In other words, the Terminal held itself out to the public as a storage and distributing warehouse, and offered its facilities to all shippers so that it might obtain the initial haul on the freight when re-sold, or re-distributed and re-consigned under a new contract of carriage.

In order to secure the witness John Weidmer's, business against the Wiggins Ferry, the Terminal gave him the use of the long wooden warehouse in which the fire occurred, in order to enable him to transfer and assort his hay. Payne Brothers had the use of it prior to that time. Such use included the tracks outside as well as those inside of and passing through the structure—*the very tracks which it is asserted were in the exclusive use of the receiver.* (R. p. 195.)

The witness, August A. Poland, commercial agent for the receiver at St. Louis, testified to a precisely similar, if not the identical, arrangement between the Terminal Association in behalf of the consignees under which the cars were accepted by the Terminal and stored. (R. p. 243-244.)

W. H. Calvert, the local agent of the receiver at East St. Louis, testified to the same or a similar arrangement. (R. p. 245.)

The contract of August 1st between the Peoria Company and the Terminal, out of which so much is sought to be made by opposing counsel, discloses, upon its face, the fact that the Terminal Association was in the business of furnishing "storage room." (R p. 100.) And cars which paid bridge toll were "handled free."

These instances will be found directly in line with the agreement for free storage between the Terminal and the consignees. And fully establish the reasonableness of the proposition that the Association, in receiving the cars in controversy from the receiver, was acting as warehouseman, either in its own right or as agent for the consignees. It was not necessary that it should appear that there was a separate charge made for such storage. The freight to be ultimately paid as compensation for the whole service, *or the delivery for future transportation,* was sufficient consideration for the promise to keep safely and made the Terminal Association a bailee for hire. *Barron vs. Eldredge, 100 Mass., 455.*

And its liability as such bailee began when the goods were delivered at, or rather on, its premises, and when it had either expressly or by implication

received them. A custom may be proved to show an implied receipt of the goods. *Story on Bailments, 9th Edition, 445.*

(k) When new way-bills were issued, time for storage had passed.

Opposing counsel argue that the testimony shows that the consignees had an agreement with both the receiver and the Terminal for holding barley at East St. Louis. This argument is well answered by the Court of Appeals, where, in its opinion, it says: (R. p. 346):

> Whether the receiver, either in ignorance of the agreement of the association with the consignees, or for other reasons growing out of the custom of business between the two companies, supposed himself to be in some sense responsible for the consignments in question, *is not material.* * * * *To a consignee who has provided a place for the receipt and storage of his goods, a carrier is certainly under no obligation to afford like facilities;* and if by reason of an independent contract the carrier has the right to make delivery or store goods in the same place provided by the consignee, the carrier does not, on that account, remain responsible to that consignee for the safety of his goods after depositing them in that place. These consignees, having bargained with the Terminal Association to hold their cars upon its tracks, the tracks became theirs for that purpose, just as much as otherwise they would have been the tracks of the receiver under his agreement with the Terminal Association, and the cars, having been placed upon those tracks, the receiver's possession and responsibility ceased, as they would have ceased if the cars had been placed on private tracks of the consignees; and whether way-bills had been handed over or remained in the possession of the receiver could be of no possible significance.

> The principle of law underlying these propositions, if they are not to be regarded as elementary, are well established and familiar, and are quite in harmony with the opinion in *Mt. Vernon Company vs. Alabama Great Southern R. R., 92 Ala., 296,* and other cases to which reference has been made. See, also, *Pratt vs. Railway Co., 95 U. S., 43.*"

But opposing counsel say that the existence of these two agreements to hold the barley for the consignee should be reconciled in this manner, namely (Brief, p. 39-40):

> "that the arrangement which the consignees had with the receiver * * * was intended to apply while it was standing on the tracks which the receiver used between the *time of its arrival* at East St. Louis, and the *time when it should be way-billed* over to the Terminal Association; and that the arrangement they had with the Terminal * * * applied to the cars of barley after they had come into the possession of that Association in the usual and customary way by the *delivery of way-bills* * * * or to cars which the receiver could not hold on his tracks by reason of the limited space which he had contracted for being fully occupied * * * * *."*

Reconciliation in this manner fails by reason of the fact that *after* the consignees gave instructions for a new way-bill *there was no storage necessary;* the cars immediately began a new transit. The storage, to be of any benefit to the consignees, was from the time the barley arrived in East St. Louis and was set on the tracks of the Terminal, until the grain was sold and a new way-bill made out. *This was absolutely the only storage that could have been contemplated.* No cars were ever held in storage *after* the new way-bill was made out: *the way-bill itself started the cars on the*

new transit. Such way-bills were dependent upon and incident to such re-sale—a matter over which the receiver had no control whatever.

The arrangement for storage could not apply to "cars which the receiver could not hold on his tracks by reason of the limited space, etc.." since from opposing counsel's own view of this case, the receiver had tracks for one hundred and fifty cars, and at the time of the fire there were only seventy cars there. If such agreement is to be construed as applying to cars which the receiver *could not* put upon these tracks, then the agreement did not apply to any cars that were burned, since such cars *were on these tracks*, and only seventy in number.

The evidence, however, is not conflicting. The "arrangement" which is referred to in the testimony of the receiver's witnesses, is the word used to distinguish between the original contract of shipment, and the action on the part of consignee in changing the destination. The word "hold," used by the witnesses can only be construed as *arresting and ending* the original transit of the barley at East St. Louis.

Therefore, instead of there being evidence of two arrangements with the consignee to "hold the barley in storage"—one by the receiver and one by the Terminal—the evidence is of (1) a *custom* on the part of the consignees to arrest the course of the original

transit at East St. Louis, and (2) an *agreement* between the consignees and the Terminal, whereby the latter was to *store* the barley *after* its transit had been *arrested*.

The *custom* is the result of the exercise by the consignees of their right to change the destination of shipments. The *agreement* provided for the care of the shipments from the time they were arrested until the consignees determined the new destination, which was when the barley was re-sold. The custom and agreement do not conflict and need no strained reconciliation, but one follows the other in natural sequence.

(I) If the agreement to store the cars was between the Receiver and the Consignees, then the Receiver is not liable.

If we admit the strenuous contention of the petitioners. *here made for the first time in this litigation*, that the agreement to hold this barley in storage at East St. Louis was between the receiver and the consignees, even then the receiver is not liable for its loss. This Court could then affirm these cases on the well settled principle, that if a decree is right, it can not be reversed simply because the reasoning assigned by the lower court does not apply.

(m) **Such an agreement would at most make the receiver a warehouseman.**

The question thereupon arises—when does the liability of a railroad as a common carrier cease, and when does the liability of a warehouseman begin? To answer the question and to sustain the above deductions, we refer to the case of *Gregg vs. Illinois Central Railroad Company, 147 Ill., 550*, and quote the following from the opinion of the court delivered by Mr. Justice Shope:

> "The law is well settled in this state that the liability of a railroad company as a common carrier of freight, ceases upon the unloading of the goods from the car at the place of destination, and placing them in a safe and secure warehouse; *or, where the carrier is not required, in the usual course of business, or expected, to remove the freight from the car, as in the case of grain in bulk, coal, lumber and the like, by delivering the cars in a safe and convenient position for unloading at the elevator, warehouse or other place designated by the contract or required in the usual course of business; or, if no place of delivery is thus designated or required, on its side track, in the usual and customary place for unloading by consignees.*"

In support of the foregoing, the Supreme Court of Illinois, in that case, cited with approval many prior cases firmly establishing the principle in Illinois, especially *Railroad Company vs. Scott, 46 Ill., supra.*

In stating the above doctrine that Court further says:

> "In all such cases the question to be determined is whether anything remains to be done by the carrier in completion of its contract to safely carry and deliver the

> goods at the place of destination. If there is, its liability as a common carrier continues: If there is not, and the goods remain in the possession of the carrier, its liability in respect thereto, when not varied by contract or usage, is as warehouseman only."

Let us apply that well accepted test to the facts in the case at bar. Did anything remain to be done by the receiver of the Peoria Company in completion of his contract safely to carry the cars and their contents from Pekin, Illinois, and safely to keep, and safely to deliver them at East St. Louis. We contend that in the handling of this class of business, the lines were well established in two ways: First, by the ordinary and usual course of business, which had been in existence for three years; and, second, by the express arrangement between consignees and (admitting for the sake of argument) the receiver; and the lines so established were that the receiver was to haul the cars and contents from Pekin to the end of his rails in East St. Louis, and there place them on certain designated "Ys" belonging to the Terminal, when "the receiver was done with them" and his duty ended. They were then to be attached to by an engine of the Terminal, which engine was to haul them in, break up the train and deposit the cars on tracks in the yards of the Terminal, where they were to await a fresh destination from the consignee. This, the uncontroverted evidence shows, was faithfully done. We have fairly and fully met the rule in the *Gregg case*, and

shown that the receiver was "not required in the usual course of business or expected to remove the freight from the cars," and that the receiver did safely deliver the cars at the "place required in the usual course of business."

From the entire discussion under this point we state these conclusions:

The cars and contents had arrived at the place *of destination* named in the original contract of carriage or designated by the consignees.

The carrier was not required, in the usual course of business, nor expected, to remove the freight from the cars.

No *place of delivery* was designated by the original contract of carriage; the grain was for resale and reconsignment in the same cars.

In the usual course of business, or by special arrangement, the cars and contents were to be placed on the tracks of the Terminal Railroad Association at East St. Louis, there to await the convenience of consignees and a favorable market. ***This was done.***

Pending such resale, the cars, by agreement with the consignees, were in the exclusive custody of the Association, as warehouseman.

Therefore the liability of the receiver had ceased.

II.

In the performance of the original contract of carriage, nothing remained to be done by the Receiver.

(a) A common carrier is under no obligation to notify a consignee of the arrival of a shipment.

Opposing counsel contend that the cars and contents were being held as a common carrier, because no notice had been sent to the consignees of their arrival. There was no obligation on the receiver to send such notice.

In *Transportation Company vs. Hallock, 64 Ill., 284*, the Court says (p. 286):

> "Whatever other courts may have decided on this question, it is the settled doctrine of this Court that the liability of a common carrier terminates with the delivery of the goods in a safe warehouse, *and notice of their arrival is not required to be given to the consignee.*"

After reviewing

Vincent vs. Railroad, 49 Ill., 33,
Railroad vs. Alexander, 20 Ill., 23,
Porter vs. Railroad, 20 Ill., 407,
Davis vs. Railroad, 20 Ill., 412,
Richards vs. Railroad, 20 Ill., 404,
Railroad vs. Scott, 42 Ill., 132,

the Court further says: (p. 287.)

> "These cases were decided upon an examination of many authorities, and the rule declared that where articles to be transported have arrived at their destination, and have been removed and stored in a warehouse owned by the carrier, *or by some other party*, the duty of the carrier is *terminated.*
>
> * * * * * * * * *
>
> These cases also hold that it is not necessary the railroad managers or employers should give notice of the arrival of the goods to the owner or consignee."

This doctrine is also the law in Missouri; see

Gsahweiler vs. Wabash, 83 Mo., 122.

Hotzclaw vs. Duff, 27 Mo., 395.

Cramer vs. Express, 56 Mo., 528.

Rankin vs. Pacific, 55 Mo., 168.

The very late case of *Illinois Central vs Carter, 165 Ill., 570,* reiterates this doctrine in the following language (p. 575):

> "It is well settled that the duty of a railroad company as a common carrier terminates when it has carried the goods to their destination, and there placed them in its own safe deposit or other warehouse. The cases in this Court so holding are cited in *Gregg vs. Illinois Central, 147 Ill., 550.* Nor is notice to the consignee of the arrival or storage necessary to terminate liability as a carrier, but upon warehouseing the liability is at once changed to that of a warehouseman."

This case also bears strongly on the one at bar in another important particular. The shipment there in controversy was of ink from Chicago to St. Paul, to the shipper's order. It was hauled from Chicago to East Dubuque, and delivered to the Diamond Joe Line, and

thence up the river and deposited in its warehouse at St. Paul. After its arrival, the shipper sent direction to the representative of the Illinois Central at St. Paul as to its delivery to various persons, distributing portions in St. Paul and others for reshipment. In carrying out these directions, a mistake occurred by which some two hundred packages of the ink was delivered to the wrong person. The shipper thereupon sued the Illinois Central to recover the value. The declaration is in assumpsit, and counts upon a breach of duty for a failure to deliver goods according to directions. The Court states (p. 574) the contentions of the parties as follows:

> "The theory of plaintiff's case is that the defendant by its receipt and bill of lading, became liable as a common carrier for the through shipment and safe delivery of the goods at St. Paul, and that such liability still existed when the 200 boxes sued for were delivered to E. and J. contrary to the order of July 14th. That of the defendant is * * * * * if the undertaking was for a through shipment, it discharged its duty and liability by safely carrying the goods to their destination, and there placing them in a secure warehouse."

On this state of facts, which shows that the shipper was using the warehouse of the Diamond Joe Line as a distributing point, and that the goods were being stored there for the convenience of the shipper, the Court says (p. 579):

> "It would be unreasonable to hold that the shipper could deal with the goods as he claims to have done and still hold the defendant to the strict liability of a common carrier *during the indefinite period in which he undertook*

> *to leave them in the hands of the carrier for distribution.* Even if Williams (general agent of the defendant) had been the agent of the defendant for the delivery of the goods, we do not understand he could thus extend the liability of the defendant by an arrangement with the shipper for their distribution in the future without some evidence showing he had authority to do so. We think defendant's liability *terminated with the safe carriage and warehousing of the property at St. Paul, and that the plaintiff must look to the Diamond Joe Line, as warehouseman, for any mistake or wrongful disposition of the same by it.*"

This is precisely our contention here. Our duty as a common carrier terminated with the safe carriage and delivery of the barley at East St. Louis, and the shippers or consignees must look to the Terminal Railroad Association, as warehouseman, for its damage and destruction. The consignees were using the yards of the Association as a place of storage and distribution.

While the receiver was under no legal duty to notify the consignees of the arrival of these shipments, still opposing counsel insist that there is nothing in this record which shows that the consignees had any notice of them. This statement is also unsupported by the evidence, as is shown by the testimony of their own witnesses, the shippers themselves.

(b) The consignees had notice.

Mr. E. J. Tuli, Secretary of the W. W. Cargill Company, one of the petitioners herein, testified positively that the consignees were notified every evening of the shipments made that day. (R. p. 256).

Q. "How did your consignee know that cars would be coming to him?

A. "*We notified him every evening* when the boy came down from the elevator. He got down about 5 o'clock. He leaves the notification with the railroad agent where to ship this stuff. He comes to the office and makes out a notification to the party to whom the stuff is to be shipped, giving the car number, date of shipment, etc.

Q. And this is sent to the consignee?

A. Yes, sir.

Q. What is sent to the consignee?

A. *The car number, the date of shipment, the amount of grain shipped, etc.*

Q. Simply in the form of a letter?

A. We have a kind of form for that."

And this form of notice, upon which these consignees were notified every evening of the shipment of barley made that day to them, was made a part of Mr. Tull's testimony, and marked Exhibit "B," and is to be found in the record at page 268.

Mr. S. Y. Hyde, President and Manager of the Hyde Elevator Company, also one of the petitioners herein, testified likewise that the consignees were regularly notified of these shipments (R p. 262).

A "We shipped it from the station in the country, get a receipt for it, and it is brought here to the elevator at LaCrosse, and, when it is properly prepared, consign it to St. Louis, wherever it is to go. Our elevator foreman loads the cars for St. Louis, and a list of the cars that he has loaded during the day is sent to the agent of the C., M. & St. P. Ry., and he is instructed to forward those cars to the consignee at St. Louis. *Then we notify the consignee of the car numbers, the weight and sample (using the form attached and made a part of this deposition, marked Exhibit 'C')* of the barley, whether it is A or B, or whatever it is."

The form used by the Hyde Elevator is also in this record at page 268. The form used by the Hunting Elevator notifying their consignee, is to be found at page 300 of the record.

Mr. Jacob Rau, also one of the petitioners herein, testified in regard to his manner of handling this barley, that he hardly ever received a bill of lading but that he

> "*simply advised the consignee by letter that you [he] had shipped the car.*" (R. p. 293).

Therefore, while reiterating the fact that there was no duty upon the receiver to notify these consignees of the arrival of these shipments, it fully appears from this record that on the night of the very day when these cars were started at their point of origin, the shippers notified the consignees, and it is a mild and safe presumption that long before the cars ever arrived these consignees had these letters from the shippers, advising them of the shipment. It was their duty to be on hand to receive the cars.

(c) In point of fact they were always on hand to note and tally arrivals.

Calvert, chief clerk for the receiver at East St. Louis, says:

> "The consignees have representatives who make regular trips to the various yards in and about East St. Louis *daily* for the inspection of this grain, and samples are se-

> cured from the cars and taken on 'Change or on the Board of Trade, if you choose, and there the grain is sold by sample; unless in some cases where a sale is made and a certain grain is guaranteed, and in that case, as I said yesterday, that is barley that goes straight through without stopping.
>
> Q. I understand you to say these inspecting agents are agents of the consignees?
>
> A. *Agents of the consignees;* that is, the firms to whom the barley is consigned in the body of the way-bill—commission." (R. p. 232).

We suggest, also, that if as a matter of fact these consignees did not have actual notice of these shipments, opposing counsel would have had them to so testify.

(d) Receiver owed no duty as a common carrier to store cars and contents at East St. Louis for the convenience of the consignees.

Opposing counsel contend that it was the duty of receiver to furnish facilities for breaking up his trains, and placing the cars on proper tracks, preparatory to making a delivery to his connections, and argue therefrom that it was immaterial whether he owned the facilities or employed the Terminal Association to fnrnish them.

Even if the legal proposition stated is correct, the conclusion does not follow, for the reason that the services being performed by the Association at the time of the fire were *not* the acts of taking the trains and breaking them up in accordance with the contract

entered into with the Peoria Company. *After* this service had been performed, and at the time of the fire, the Terminal was performing a *distinct duty* it owed to the consignees. by virtue of an express agreement to

"hold the cars on their tracks at East St. Louis"

for the convenience of these consignees. (R. pp. 239, 240.)

The property was not damaged or destroyed durin the performance of any duty owed to petitioners by the Terminal or by the receiver, as a common carrier. Neither were under any obligation as a common carrier to store the property for an indefinite time for the convenience of the consignees. Such an undertaking is no part of a common carrier's duty, and if it is to be performed it must be the subject of a distinct and express agreement, ***which the record shows existed between the consignees and the Terminal Railroad, and with which the receiver had no concern or interest.***

The *Covington Stock Yards Case, 139 U. S., 128,* cited by opposing counsel, involved a controversy wholly foreign to this. The main question determined there was whether a common carrier could be compelled to receive and deliver ***live stock*** at a platform and chute provided by a shipper, or deliver the same free from extra charge for its passing through the yards of the appellant. The Court there said:

> "The railroad company holding itself out as a *carrier of live stock*, was under a legal obligation, arising out of the nature of its employment, to provide suitable and necessary means and facilities for receiving *live stock* offered to it for shipment over its road and connections, as well as for discharging such stock after it reaches the place to which it was consigned."

It cannot be said that the obligation "to provide suitable and necessary means and facilities for receiving" barley offered to the receiver for shipment, "as well as discharging" such barley "after it reaches its destination," had not been fully performed *before the fire.*

If the receiver was under any obligation by reason of his employment as a public carrier, in addition to transporting the barley the whole length of his rails, to provide a distributing warehouse at a point beyond his own terminus and there hold and store the grain subject to the convenience of the consignees, then the Covington Stock Yards case becomes pertinent, and the rule there announced that it would not concern the petitioners whether the receiver discharged this obligation or employed the Terminal to do it, would be applicable. *But such storage of grain is no part of a common carrier's duty.*

In the application of this test below, it was argued by opposing counsel that one act remained to be performed by the receiver, and that was, he should deliver to the Terminal Railroad Association new way-

bills or manifest showing fresh destination of the cars. In reply to this our contention then was, and now is, that such new way-bill was the creation of a new contract of carriage by the consignee, and incident thereto, and not the performance of any act of the original contract of carriage. The relations of the receiver to such new contract might be those of forwarder or accommodation agent, in that behalf, for the consignee or consignor, but not those of a carrier.

No case can be found imposing upon the carrier the duty of making out new way-bills, as part of the original contract of carriage, or as incident thereto, where goods have been once delivered at the designated place of deposit for unloading or distribution and further transportation, at the pleasure or convenience of the consignee.

It may also be contended that there remained for the receiver to obtain the direction of the consignee as to where the consignee desired the cars to be finally sent. The reply to this is again, that such directions came only after the original consignee had sold the goods in question to a third party, either by private sale or on the Board at St. Louis, and when such direction did come *it was the beginning of a new contract of carriage;* the goods became the subject of a re-shipment, the consignee became the consignor and quite another person or company the consignee, and the destination was altered accordingly.

Thus, all the acts of the receiver in connection with the barley, or cars containing it, after they had been set to the tracks of the Terminal Association at East St. Louis, were acts not performed in the execution of the *original contract of carriage* from the shipper to the commission broker, but were incident to a *new and distinct contract* of carriage from East St. Louis to the fresh destination indicated by the consignee, and in which the consignee of the original contract became the consignor, and the new purchaser became the consignee. That the duty of the receiver in that behalf was simply the transmission by him of the instruction of the original consignee to the Terminal Association, is clearly shown by the following evidence of the witness Calvert (R. p. 215):

> Q. "I omitted to ask you as to these cars coming to the C., P. & St. L. from the C., M. & St. P., how long, as a rule, the consignees left them there?
>
> Objection. Incompetent, immaterial, irrelevant, not in the issue.
>
> A. That is a pretty hard matter for me to give an intelligent answer on.
>
> Q. Shortest and longest time?
>
> A. There is a great many of the cars we have orders for before they arrive, giving us designated points for their delivery. Then there are a great many of them we do not get orders on for some time. Furthermore, there is one or two of the firms there that place an order at the beginning of the season to give either the Wiggins Ferry Company or the Terminal Railroad Association all their business, which is then held by the Terminal Association or the Wiggins Ferry Company, and forwarded on to the destination by orders direct from the consignee—

either the Wiggins Ferry Company or the Terminal Association. I should judge the average of that barley business would be, well, I will say a week. That is simply my guess.

Q. Give me the shortest time and the longest time then; the average in your opinion?

A. Some of them would stay there for thirty days; and then some would go right through without stopping.

Q. Dependent on?

A. Dependent on the condition of the market, and the market was governed altogether by the condition of the weather. During the warm weather they wouldn't unload; if we got a cold spell we would get a rush on barley; warm, slack up.

Q. After cars arrive you put them in the designated place of deposit on these Y's, by means of your engines. I will ask you whether or not you proceeded to take the direction of the consignee pursuant to the way-bill that accompanied the car, as a new matter outside of the way-bill and for the convenience of the consignee?

A. New matter altogether. All barley business handled under special instructions issued by the consignees of the shippers. Furnished way-bills to us. Information furnished on the way-bills to us; not so, all of it; some, where it was billed directly through, of course, not stopping; didn't ask the consignees for the disposition of that, but that is only to a brewery, for instance, that they may know just how much they want to use, and have it billed that way; but all the other firms, go and get special orders from the consignees."

Cross-Examined.

Q. Then, with such a bill marked Teichman Commission Company, St. Louis, Mo., before you refer the matter to the agent at Wycoff, where the shipment started, you will find out where the Teichman Commission Company was, and where you could made delivery of the cars?

A. Yes, sir.

Q. This testimony you have been giving with reference to customs applies generally to shipments of barley?

A. Yes, sir; so far as the C. P. & St. L. is concerned. Can't answer as to the custom on other roads.

Re-Direct.

Q. "I will ask you, would you have undertaken to send this car to St. Louis if you didn't get the direction?

A. "No, sir; because I would have had no guide.

Q. "East St. Louis was the destination?

A. "Yes, sir; until we received orders from the consignee as to the final disposition."

Re-Cross

Q. "You would seek out information to enable you to make delivery of the contents of that car?

A. "Yes, sir.

Q. "Taking the way-bill as a starter to find out?

A. "Yes, sir.

Q. "The only means you had?

A. "The only means I had of learning to whom I should go for the order."

Re-Direct.

Q "It is suggested by the receiver, who is present, and I will ask you if it is not and was not the ordinary way of billing these cars, to bill them to East St. Louis and then leave the consignee to direct you as to how or by what route they were to be shipped further to the final point of disposition?

A. That is the custom of billing on lines entering East St Louis."

Upon the above evidence, supported also by that of Stapleton; the Receiver, and the consignees, we submit this fair conclusion:

The acts of the receiver subsequent to placing the cars on the "Y's" of the Terminal at East St. Louis, were not acts performed in connection with the execution of the *original contract of carriage*, and therefore can not be said to be acts which remained to be done by the carrier as an incident to or in relation to such original contract.

(e) The duty of the receiver to safely carry and deliver freight having ended, any custom or practice of his employes in aiding the consignee in giving directions for future transportation was purely an accommodation to the consignee, for which the receiver was in no wise responsible.

Much is made, by opposing counsel, of the fact that often the receiver's agents, after receiving instructions from the consignees would make out the new way-bill and deliver it to the Terminal. Counsel contend, as we have seen, that the delivery of this *new* way-bill was absolutely essential to relieve the receiver of liability, but in support of that contention they cite no authority except cases involving through shipments between connecting carriers. In all such cases the original way-bill showing the through carriage and the ultimate destination is forwarded. Here there was no through carriage. The original way-bill showed upon its face that the freight

had reached its destination. The only instruction to be delivered pertained to future transportation under a new contract of carriage. The attention of the court has already been called to the fact that the *new* way-bill which was made out was a Terminal way-bill—that is, it was filled in on Terminal blanks, provided by it for that purpose, and in which the Terminal appears as the initial carrier. This is clearly established by the testimony of Beecham, the employee of the St. Paul company, and of Phelps, the local agent of the Terminal Association. Exhibits "L," "T." "U," and "V." (R. p. 133-140 and 162).

Very often the information necessary to fill such blanks was communicated by the consignees directly to Roederer, freight agent for the Terminal Association and joint agent for the Terminal and Merchants Bridges. (R. p. 211.) And from whom Phelps received orders. (R. p. 83)

Opposing counsel, in their brief, leave the impression that Roederer was the agent of or had some official relation to the receiver. This is entirely gratuitous. His precise employment is fully stated above. The testimony shows that "a great many times" such information was sent by the consignees direct to the Terminal. (R p. 192).

Now, we submit, that the custom of receiver's employees in becoming the channel through which the

information as to a fresh destination was usually communicated by the consignees to the Terminal, and which enabled the latter, under a new contract, to move freight over its own line, the physical possession of which it already had, can in no wise affect the receiver's liability either as carrier or warehouseman under the old contract of carriage; because the communication of such information was no part of the original contract of carriage, and was wholly beyond the line of duty of the receiver's employees.

The performance of these acts by the receiver's employees was wholly gratuitous and purely an accommodation to the consignees. They were anxious to get and keep all the business possible; to do this clerical work was very little trouble since they already had in their office the original data, and it was certainly a great accommodation to the consignees. If it was no part of the duty incurred under the original contract, or incident thereto, its performance was unnecessary to a compliance with that contract.

In *Jewell vs. Grand Trunk Railway, 55 N. H. 84*, the Court says:

> "It is difficult to see how, after defendants' duty had ended as to the delivery of the freight, any custom or practice of Monneghan's (its employe), in assisting consignees in moving or loading their goods, can affect the defendants. The defendants are only responsible for their servant's acts when acting within the line of his duty, and within the line of their duty to their consignees. When that duty has ended, they are no more responsible for his acts and doings than for the acts and doings of any other person."

Why, therefore, should any inference be drawn, or assumptions based, on these acts of the receiver's employees wholly outside of their line of duty, in reference to his discharge of liability under the terms of the original contract. And it is to be remembered that this litigation is between the receiver and the consignors on that contract, and not between the receiver and the consignees on some other contract or relation. If there was any default on the part of the receiver in the matter of imparting such information, it was, at the most, only a duty to the consignees, incident to the next contract of sale and carriage, with which the original consignors, the petitioners herein, had no concern. The liability, if any, therefor, can only be to the consignees.

(f) Goods held subject to orders are held as warehouseman.

In *Railroad vs. Montgomery, 39 Ill., supra*, it appeared that hay was placed on cars one Friday; on the next morning the conductor of the freight train was about to take it away, when the consignor said he did not wish it to go until he could see the person to whom he had sold it. The cars were left, and on the next day the hay was destroyed by fire from a passing locomotive. On this state of facts, the Court said (p. 337):

> "the technical liability of a common carrier does not attach until the delivery to him of the property is com-

plete. If, for example, the same person is common carrier and warehouseman, and he receives goods to be forwarded when he has orders from the owner, his liability in the meantime is that of a warehouseman, and not that of a common carrier."

This principle is well established.

Railroad Co. vs. Scott, 42 Ill., supra.

Cairns vs. Robbins, 8 M. & W., 258.

Pittsburgh vs. Barrett, 3 Am. & Eng. R. R. Cases, 256.

Michigan R. R. vs. Northern R. R., 7 Mich, 515.

O'Neil vs. N. Y. Cent., 60 N. Y., 138.

Barron vs. Eldredge, 100 Mass., 455.

Nichols vs. Smith, 115 Mass., 332.

Hutchinson on Carriers, Sec. 82.

Angell on Carriers, Sec. 134 and note.

This principle has also been forcibly illustrated and applied by this Court in *St. Louis R. R. vs. Knight, 122 U. S., 79.* There it appeared that one Potter was a cotton broker at Texarkana; that he bought most of his cotton at points in Texas, on railroads running into Texarkana; that it was brought to Texarkana on the railroads, and delivered on the platform of a compress company, to be compressed before being reshipped north and east; after arrival on the platform it was weighed, classed and marked by Potter, after which *the railway company* was to compress it before shipping north, and pay for the compressing; after being compressed it was set out on the loading plat-

form, and was then shipped to such consignees as Potter directed; when the superintendent of the compress certified that cotton had been delivered for compress, the railway company issued bills of lading therefor to Potter. The cotton accumulated faster than it could be compressed and shipped.

In that case it was held that the liability as a carrier did not attach until Potter had designated the consignees, although bills of lading had already been issued by the railway company. The Court says:

> "It may be said that the defendant's liability as a common carrier commenced at a time antecedent to the delivery of the cotton to be loaded on the cars; that it might have arisen on a prior delivery of the cotton in question in the warehouse to be compressed and then transported, *the duty of compressing it, in order to prepare it for transportation, having been undertaken by the defendant.* This, however, could only be when the specific goods, as the property of the plaintiffs, were delivered for that purpose into the exclusive possession and control of the defendant. Such was not the case in the present instance. No specific bales, as the property of the plaintiffs, separate from all others, were delivered to the defendant for them *until the 525 bales in controversy were set apart and delivered to the defendant for immediate transportation on its cars;* and prior to that time all cotton received in its warehouse to be compressed, was received as the property of Potter, on his account, and subject, so far as grading, classifying and marking were concerned, to his control, *and none of it could be considered as having passed into the possession of the defendant as a common carrier* for transportation until designated and set apart by Potter or his agents."

This case is confirmed by the later cases of *California vs. Compress Co., 133 U. S., 387,* and *St. Louis Co. vs. Ins. Co., 139 U. S., 223.*

In the case at bar the cars and contents were awaiting a fresh destination, which could only be ascertained after the consignees had sold the barley and indicated who the new consignee was to be. Until these acts had been performed by the consignees, *whoever* held the cars and contents, held them simply as warehouseman.

But in the *Knight case* we find further facts which bring the two cases, if possible, even closer together. The Court there continues:

> "The cotton received at the company's warehouse came consigned to Potter upon bills of lading issued by other railroad and transportation companies at the point of shipment for delivery to him at Texarkana. Supposing, as one view of the evidence authorizes, the bills of lading were issued by the agents of the defendant to Potter in advance of the actual delivery of the cotton in the warehouse, on the faith of the bills of lading produced and surrendered by him, given by other carriers; still, the cotton, as it came and accumulated in the warehouse for the purpose of being compressed, continued to be the property of Potter, subject to his control in the respects already mentioned, and until specific lots were marked and designated, so as to correspond with the bills of lading previously issued by the defendant, *the latter had no possession of the property as a carrier.*"

It is because there remained ***something to be done by the consignees,*** before the cars could be moved from East St. Louis, where they were deposited on their arrival, that we submit, no matter who had possession, *such possession was not that of a carrier.*

(g) **Where the consignees are accustomed to use the warehouse of the carrier, the transit ends when the goods arrive.**

The principle is also well established that where the consignee, having no warehouse of his own, is accustomed so to employ that of the carrier, the transit ends when the goods arrive and are set at the usual place of storing, even though they immediately receive a fresh destination.

In *Foster vs. Frampton*, *6 B. & C., 107*, where goods are to be delivered to the vendee at a particular place, the *transitus* in general continues until they are delivered to him at that place. But if he, by his own act, prevent the delivery, which otherwise in the ordinary course of business would take place, and does any act equivalent to taking possession, the *transitus* is thereby terminated. And, therefore, where the vendee of several hogsheads of sugar, upon receiving from the carrier notice of their arrival, took samples from them for his own convenience, and desired the carrier to let them remain in his warehouse until he should receive further directions, and before they were removed, the vendee became bankrupt, it was held that the *transitus* was at an end.

This principle is well illustrated in cases involving the right of *stoppage in transitu*, since it is well es-

tablished that such a right does not exist unless the goods are still in transit and have not been delivered to the consignee.

In *Scott vs. Petit, 3 Bosanquet & Pullier, 469*, it appeared that on the 16th day of March, goods were forwarded from Manchester addressed to A, at the Bull Inn, London, in consequence of a previous order from him. On the 23d of the same month the goods were sent to the defendant's house, as the packer of A, the latter having given no direction at the Bull Inn respecting these particular goods, but having given a general order that all goods addressed to him should be sent to the defendant, A having no warehouse of his own. On the 11th day of March, A committed an act of bankruptcy. When the goods arrived at the defendants, they were booked to the account of A, and the defendant not knowing of A's bankruptcy, unpacked the goods to ascertain their contents. On the 31st day of March, the goods were claimed by the consignors, and on the day after by the assignees of A, against whom the commission had been taken out.

The consignors claimed the right of ***stoppage in transitu***, to support which it was necessary to show that the goods had not been delivered to the consignee. The Court, however, held that the ***transitus*** of the goods was at an end when they arrived at the defendant's house; and consequently, that the consignor's right of ***stoppage in transitu*** did not exist, and that

the plaintiffs, as assignees of A, were entitled to recover them in an action of trover. The Court said, p. 472:

> "In this case it seems to me impossible to raise a doubt, whether the transit was at an end or not; for if the bankrupt had no warehouse to receive the goods, but that of the packer, the transit never could be at an end if it did not end there. * * * * *
>
> "If the bankrupt in this case had possessed a warehouse of his own, and the packer had merely taken them as a middle man, the consignors might have stopped them. But there being no other place of delivery but the warehouses of the packer, the goods when received there had gone to their last place of delivery, and consequently were no longer subject to the right of *stoppage in transitu*. * * *
>
> If the warehouse of the packer was not to be considered as the place of delivery of the bankrupt in the case, there could be no place of delivery at all, for the bankrupt had no other opportunity of receiving the goods but by the hands of defendant." (p. 473.)

Another case in which the same question is presented, is that of *Rowe vs. Pilford, 8 Taunton, 83.* There it appeared that a trader in London was in the habit of purchasing goods at Manchester and exporting them to the Continent soon after their arrival in London. The goods so consigned to him remained in the wagon office of the defendants, who were carriers, until they were removed by his agent for the purpose of being shipped. The consignments of goods for the trader was delivered to the defendants on the 9th and 12th of August; on the 14th and 17th inst. the goods arrived at the wagon office of the defendants, on the 16th or 17th inst. the trader became bankrupt, and

on the 19th inst. notice of non-delivery to the bankrupt was given by the consignor to the defendants, who, according to order, delivered the goods, on the 21st, to a third house The assignees of the bankrupt, the consignees, brought an action to recover the goods, and it was there held that they were entitled to the same, and that the right of the consignor to *stoppage in transitu* ceased on the arrival of the goods at the wagon office of the defendants in London. In support of the conclusion there arrived at, the Court said, p. 85:

> "In *Richardson vs. Goss, (3 B. & P., 127) Chambre, J.*, said that he was strongly inclined to think, that, if a man be in the habit of using the warehouse of a wharfinger as his own, and make it the repository of his goods, and dispose of them there, the journey would be at an end when the goods arrived at such warehouse; and, in *Scott vs. Pettit (3 B. & P. 472) Lord Alvaney* said, he perfect'y coincided with *Mr. Justice Chambre* in that which he had intimated in the former case. Both these cases were recognized in *Dickson vs. Baldwin, (2 B. & P. 578)* and there were confirmed by *Lord Elenborough.*"

In *Allen vs. Gripper, 2 Compton & Jervis, 218*, this principle is applied to a state of facts *strikingly similar* to those in the case at bar.

Lord Lyndhurst, C. B., says (p. 220):

> "The facts of the case are shortly these: Pestall had been in the habit of employing defendants for several years; and the course of dealing appeared to be, that the oil cakes were carried to Hertford, in the defendant's barge, and deposited in the defendant's warehouse, generally, for many months. * * * * * * There was also evidence to show that they were so deposited

for the convenience of Pestall, that they might be distributed to his customers, many of whom resided in the neighborhood. * * * * On this state of facts it appears to me that the *transitus* was at an end."

On the same question *Bailey, B.*, says (220):

"It appears by the evidence that the defendant's warehouse was the place at which these goods were to stop, and that the warehouse was to be considered, for the purpose of depositing these cakes, as the warehouse of Pestall, the purchaser. *The goods were not to be forwarded to Baldock* (where Pestall carried on his business) *without fresh orders; and they were to go*, according to the evidence in the cause, *to Baldock, or the customers of Pestall, as he should direct.* He thus had the complete power of giving a new destination to the goods, *and when they arrived at the place where they were to await such fresh destination*, the *destination* contemplated by the plaintiffs and Pestall *was at an end.*"

In view of these decisions, the conclusion of the master, sustained by the dissenting opinion of Judge Jenkins, that the goods were in transit, is clearly against the weight of authority.

(h) By arrangement the consignees used the tracks of the Terminal Association for warehouse purposes.

In support of the above we refer again to the stipulation as to the evidence of the consignees, quoted at page 20 above, and the testimony of W. H. Calvert, found at Record page 231, in which he says:

"Well, the class of freight allowed to stand there consists of grain, barley in particular; hard coal, pig iron and salt, and other commodities that are held on what we term the market; in other words, forwarded there, (not

in all cases, but as a rule) and held for the accommodation of the consignees, which is virtually for the interest of the shipper; the barley being held on commission to await an advance in the market: in other words it comes in there, and if the market is all right when it arrives, they sell it immediately, but as a rule, hold it until the market suits them."

The above evidence stands uncontradicted. From it there is but one logical deduction, and that is that the barley was held on the tracks of the Terminal Railroad Association, in their yards at East St. Louis, as a distributing point, free of storage for the convenience of, and for the purpose of giving the consignees an opportunity to sell the same, when they thought the market had reached its highest point, and after selling the same, to re-consign it in the same cars to the purchasers.

The moment the Terminal had attached its engines to these cars, *there was a physical delivery of the cars and contents to it*, and into its exclusive custody to hold the same awaiting further instructions, *not from the receiver for a continuance of the original contract of carriage, but from consignees for a fresh destination and new contract of carriage.* If the agreement to hold them there was with the receiver, he held them as a warehouseman only.

If, afterwards, loss resulted, the receiver would not be liable as a common carrier therefor.

This rule is well settled in the *Gregg case, 147 Ill*, *supra*, where the Court says, at page 559:

> "It is urged that the railway company was at fault in depositing the grain with Dunbar and Company, whose warehouse was submerged by the flood, when there were other elevators and warehouses at Augusta upon higher ground, and which were not affected by the flood, in which the grain might have been stored. The question of whether it could have been thus stored may be said to be a controverted question of fact. But waving that, and also, for the present, the question of whether Dunbar & Company were not the agents of appellant to take care of and store the grain, the court was justified in holding, as it did in effect, in its rulings upon the propositions offered, that the railroad company was not liable because of storing with Dunbar & Company.
>
> * * * * * * * * *
>
> The railroad company was not required to keep the corn in its cars on track indefinitely, and although the consignee was in fault in not receiving the freight, after reasonable time and opportunity had been afforded in which to take it, the carrier could not abandon it, but was required to exercise ordinary and reasonable care for its preservation as warehouseman. *In the exercise of such care it might leave it in the cars*, store it in its own warehouse, assuming the liability of bailee or warehouseman therefor, *or it might, with the exercise of a like degree of care in selecting a responsible and safe depositary, STORE THE GRAIN IN AN ELEVATOR OR WAREHOUSE AT THE EXPENSE AND RISK OF THE OWNER, AND THEREBY DISCHARGE ITSELF FROM FURTHER LIABILITY.*"

How much stronger the case at bar! Since the Receiver was not required to exercise any degree of care in selecting a responsible and safe depositary, for that depositary had been already selected by the consignees themselves, and the receiver, in placing the cars on the tracks of the Terminal Association, simply carried out the orders of the consignees to have the grain so

deposited in accordance with the agreement the consignees had theretofore entered into with the Terminal Association for storing the grain.

It was the custom of the Terminal Association, as has been abundantly shown in the evidence, to receive these car loads of barley on their tracks at East St. Louis for the purpose of storing them there free, for the convenience of the consignees, and for the further purpose of controlling their transportation to a fresh destination, to be indicated by the original consignees when they became the consignors in a new contract of carriage. If this custom cannot be denied, then it is well settled by the law that the deposit of the cars by the receiver on the tracks of the Terminal was delivery to the latter for the purposes of the original consignees.

This is settled in *Pratt vs. Railway Company, 95 U. S., 43*, where the Court said:

> "If a common carrier agrees that property intended for transportation by him may be deposited at a particular place without notice to him, such deposit amounts to notice, and is a delivery; * * * and that such an agreement may be shown by a common practice and usage to so receive without special notice."

In the above case it was held that such a delivery to a railroad company created the liability of a common carrier. But it was also held that *if the goods so delivered to the railway company were subject to the further order of the owner*, then the case would be otherwise, and that it is well settled, under such cir-

cumstances, *the railway company's liability is that of a warehouseman only.* This latter condition was the exact state of affairs at East St. Louis. The receiver delivered the cars into the exclusive custody of the Terminal for ultimate transportation, under a new contract of carriage to be subsequently entered into; but in the meanwhile such cars were to be subject to the further order of the consignee for fresh destination after re-sale.

(i) Being sued as a carrier, recovery can not be had as a warehouseman.

The allegations are specific that the property was in transit. If this is so, the liability charged is that of a carrier, and to recover under such an allegation, the proof must show a breach of a common carrier's duty. We quote from one of the petitions, all of which are the same as to the liability alleged (R. p. 21):

> "there delivered to the Chicago, Peoria & St. Louis Railway Company, to be *transported* by it to destination; that the said last named company received said two car loads of barley, and *transported* the same as far as East St. Louis, a station on its line, *and while the same were in transit and on their way to destination*, and in the possession and under the control of said last named railway company, the said two cars containing said barley were destroyed by fire * * * * *"

Irrespective of the question in whose possession they were, the evidence is conclusive that they were being held at East St. Louis, subject to the orders of the consignees for a new destination.

It is certainly fundamental that the recovery must be on the liability charged in the pleadings. It would have been impossible to have charged the receiver with the liability of a carrier and a warehouseman at the same time, *i. e.*, the time the goods were destroyed; the goods could not have been held both as carrier and warehouseman; it must be one or the other. The selection was made and cannot now be changed.

In *St. Louis R. R. vs. Knight, 122 U. S. 79*, the defendant was sued as a common carrier, and as in the case at bar, the evidence showing something remaining to be done by the shipper, the plaintiffs attempted to fall back on the warehouseman's liability. But the Supreme Court would not permit it, saying:

> "The suggestion in the charge of the Court of a possible ground of liability on the part of the defendant as a warehouseman, *was entirely outside of the issues.* The defendant was not sued upon the ground of any such alleged liability. No facts and circumstances, out of which any duty as a warehouseman could arise, were set out in the declaration; the action was upon the bills of lading alone. The contract alleged to have been made and broken, was contained in them. The duty charged to have been violated was the duty of defendant as a common carrier for an alleged negligence in the transportation of the goods. And if the defendant could be supposed, upon the facts proven, to have incurred liability in its character as a warehouseman, as distinguished from its capacity as a carrier, that liability was not incurred in respect to the plaintiffs. *It is not charged that the defendant, as a warehouseman, received any goods as their property for the purpose of storage and safe keeping.* Its relation as a warehouseman was with Potter, and him alone. *It was an error, therefore,* in the court to charge the jury that the defendant might be charged in this action for the loss in question upon its responsibility as a warehouseman to the plaintiffs."

It may be contended that the amended petitions charge the receiver with the liability of a warehouseman, but this contention cannot be sustained. The amended petition (R. p. 52) as a premise, *restates* "all the allegations contained in the petition of each one of the foregoing interveners, as hereinbefore made and filed herein." all of which expressly aver that the cars were consigned to St. Louis, Missouri; that the cars were *in transit*; that they were in the possession of the receiver *for transportation*; *and stating facts which negative the theory that the possession was for storage.*

If the cars were not at their destination, but were in course of *transportation,* the mere fact that *incidental* to a delivery to the next connecting carrier, storage was necessary, *does not change the character from carrier to warehouseman.* This is decided in *Railway Co. vs. Mfg. Co., 16 Wall., 318.* Pleadings must be construed as a whole; by express allegation this amended petition is made a part of the original petitions; and the pleading as a whole must be construed strongly against the pleader.

Therefore, even if the facts set out in the amended petition, are such as aver a storage of these goods, that averment of storage can only be construed *on their own and oft repeated theory of the case,* to be a storage incidental to the carriage, and such possession

was that of a carrier *and not of a warehouseman.* The recovery, therefore, must be as a carrier, and not as a warehouseman.

If the pleadings charge the receiver as a warehouseman, it is for the breach of a duty owing to the consignors. Under the evidence, the duty to warehouse was for the benefit of the consignees; no storage was contemplated in the original contract for the consignors; such storage had reference to the new contract of carriage which was subsequently to be made, and with which the original consignors, these appellants, had absolutely no concern. Therefore, any breach occurring in that respect is to the consignees, who are not parties to this litigation, and as was said in the *Knight case, supra:*

> "Its relation as a warehouseman was with Potter, *and him alone.* It was error, therefore, in the court to charge the jury that the defendant might be charged in this action for the loss in question upon its responsibility as a warehouseman *to the plaintiffs.*"

So we say here, if any relation as a warehouseman existed, it was with the consignees, *and with them alone,* and it would have been error to permit the consignors to recover on the liability of a warehouseman.

(k) **The execution of such an agreement for storage would have constituted delivery to the consignees.**

If, as contended by opposing counsel, this agreement to store the cars on these particular tracks, was entered into between the receiver and the consignees, it was independent of the original contract of carriage, since there is no common law duty imposed on a carrier to store barley (the destination of which has been changed) for the purpose of permitting the consignees to sell it when the "market" suited them—and was tantamount to the consignees providing for the receipt and storage of such barley. As His Honor, Judge Woods, says in this case, (R. p. 346) and quoted more fully above:

> "These consignees having bargained with the Terminal Association to hold their cars upon its tracks, the tracks became theirs for that purpose, just as much as otherwise they would have been the tracks of the receiver under his agreement with the Terminal Association, and the cars having been placed upon those tracks, the receiver's possession and responsibility ceased, as they would have ceased if the cars had been placed on private tracks of the consignees; and whether way-bills had been handed over or remained in the possession of the receiver, could be of no possible significance."

This conclusion of Judge Woods, that the tracks became private tracks of the consignees, follows, just

as logically, irrespective of which railroad the agreement was made with by the consignees, and is in harmony with the rule laid down as to cars in *Rail-Co. vs. Railway Co., 123 Ill., 594*, cited at page 68 of opposing counsel's brief.

Let us take apposing counsel on their own argument: They base their right to recovery in these cases on the contention that the agreement of August 1, 1892, between the Terminal and the Peoria Company, by which the former was to give the latter certain storage room, acted as a conveyance of the tracks of the Terminal to the Chicago, Peoria & St. Louis Railway. If this is so, then it follows, quite as logically, that if the receiver entered into an agreement with the consignees, whereby he was to give them certain storage room for their barley, this also acted as a transfer to them of the tracks, and made those tracks the private tracks of the consignees.

If these were the private tracks of the consignees, then it cannot be questioned but that the placing of the cars thereon by the receiver constituted a delivery to them.

III.

The cars and contents were delivered to and accepted by the Terminal.

While we admitted above, for the sake of argument, that the agreement for storage was between the receiver and the consignees, *still we insist, as a matter of fact*, upon the decided weight of evidence, *it was between the consignees and the Terminal.* The consignees themselves concur and join in saying so. The question then arises, were these cars delivered to the Terminal?

(a) Pursuant to custom the cars were set to a designated place of deposit.

The record shows beyond any question that the cars were hauled by the receiver to a point on certain "Y's" belonging to the Terminal, where according to the custom existing between the two carriers, the latter sent its own servants with its own engine and took and held exclusive custody along with physical possession of the same (R. pp. 74, 213). In addition to this, it was the custom of the Terminal to take a record of all such cars deposited on these "Y's."

George H. Phelps, local agent of the Terminal at East St. Louis, sworn in behalf of the petitioners, testified as to the exact location of each car at the time of the fire. (R. p. 75).

Q. "Now you have a list of these cars; will you designate on which tracks these various cars were standing *at the time of the fire*, as near as you can.

A. *I can give you the track each car stood on; they stood on the tracks from 40 to 50, and I can give you the individual car numbers and the tracks they were on.*"

The witness then did so, naming each car and each track (R pp. 75–6–7). This shows a definite knowledge on the part of the Terminal of these cars being on their tracks. How did it come to know that these cars were there if it had nothing to do with them? The fact is they took a record of such cars every day and even knew what trains of the receiver the cars would come in on. (R. p. 77).

A. "I can't say what track that was on: that car arrived on train 37, and it was not set on these tracks until after our records were taken, so I am not able to say."

In another place counsel for petitioners asked Mr. Phelps if he had examined the records, and could state when the seventeen cars of the C. M. & St. P Company, involved in this controversy, arrived at East St. Louis, to which he replied he could, and proceeded to do so. (R. pp 95, 96).

And this was not the mere personal knowledge of the witness. as appears on cross-examination (R p. 97), but was obtained from the records of the Terminal.

Q. "Did you know personally about each of these cars, as to whether they had been, or not, delivered?

A. Consulted the records.

Q. Who made the records?

A. Clerks in our employ."

Again, on cross-examination, this is further established. (R. p. 84).

Q. "In designating these tracks in red on the blue print, and the cars standing upon them, did you do so on your own knowledge, or from information derived from others?

A. From records taken from our yard clerk.

Q. When were the records made up, before or after the fire?

A. Both before and after the fire: that day, and in the morning after the fire."

But opposing counsel will, of course, say that this fact of the Terminal making a daily record of these cars as they were set to their tracks, was of no significance, and that beyond question it did not show a delivery of them to the Terminal. Such a contention might have weight if it did not further appear from the petitioners' own evidence that the Terminal, when it made these records, *ENTERED THESE CARS THEREIN AS HAVING BEEN DELIVERED TO IT ON THE VERY DAY AND HOUR OF THEIR ARRIVAL IN THESE YARDS.* This is shown by "Ex. C," identified by, and made a part of, the testimony of Mr. Phelps, the agent of the Terminal. (R. pp. 102-92). From this transcript of the records of the Terminal appears the car number, "initial, date arrived J. S-E., date delivered, bridge, date of billing, C., P. & St. L. to Eads bridge."

A reference to this record *made by the Terminal acknowledges delivery to it* of the cars arrived, at the certain minute on the *same* day, and does not show a new way-bill under the head "date of billing" for days and weeks after the "delivery."

This record is not of the particular cars in controversy, but was introduced by petitioners *to show the custom* of handling this class of business, and is a fatal admission on the part of the Terminal that it was the "*custom, practice and usage*" to make, by its yard-clerk, contemporaneous record of arrival upon, and to accept cars set to this "designated place of deposit" *and delivered to it* for the purpose of storage, *without further notice.* If the record of the Terminal for *these particular cars did not* show such a delivery, opposing counsel *would certainly have introduced it.*

We rely on the law as laid down by this Honorable Court in the case of *Pratt vs. Grand Trunk Railway, 95 U. S., 43.* There the goods had been shipped from Liverpool to St. Louis in packages marked "P. & F. St. Louis." They were carried by the Grand Trunk Railway to Detroit, where they were destroyed by fire, under circumstances almost identical with the facts in the case at bar. A delivery was held to have been made to the connecting carrier. In the opinion of this Court it is there said:

> "At the time the fire occurred the defendant had no freight room or depot at Detroit, except a single apart-

ment in the freight depot of the Michigan Central Railroad Company. Said depot was a building several hundred feet in length, and some three or four hundred feet in width, and was all under one roof. It was divided into sections or apartments, without any partition wall between them. There was a railway track in the center of the building, upon which cars were run into the building to be loaded with freight. The only use which defendant had of said section was for the deposit of all goods and property which came over its road, or was delivered for shipment over it. This section, in common with the rest of the building, was under the control and supervision of the Michigan Central Railroad Company, as hereinafter mentioned. The defendant employed in this section two men, who checked freight which came into it. All freight which came into the section was handled exclusively by the employees of the Michigan Central Railroad Company, for which, as well as for the use of said section, said defendant paid said company a fixed compensation per hundred weight. Goods which came into the section from defendant's road, destined over the road of the Michigan Central Railroad Company, were, at the time of unloading from defendant's cars, deposited by said employees of the Michigan Central Railroad Company in a certain place in said section, from which they were loaded into the cars of said latter company by said employees when they were ready to receive them; and, after they were so placed, the defendant's employees did not further handle said goods. Whenever the agent of the Michigan Central Railroad Company would see any goods deposited in the section of said freight building set apart for the use of the defendant, destined over the line of said Central Railroad, he would call upon the agent of the defendant in said freight building, and, from a way-bill exhibited to him by said agent, he would take a list of said goods, *and would then, also, for the first time learn their ultimate place of destination*, together with the amount of freight charges due thereon; that from the information thus obtained from said way-bill in the hands of the defendant's agent, a way-bill would be made out by the Michigan Central Railroad Company for the transportation of said goods over its lines of railway, and not before.

These goods were, on the 17th of October, 1865, taken from the cars and deposited in the apartment of said building, used as aforesaid by the defendant, in the place assigned as aforesaid for goods so destined.

At the time the goods in question were forwarded from Montreal, in accordence with the usage in such cases a way-bill was then made out in duplicate, on which was entered a list of said goods, the names of the consignees, the place to which the goods were consigned, and the amount of charges against them from Liverpool to Detroit. One of these way-bills was given to the conductor who had charge of the train containing the goods, and the other was forwarded to the agent of the defendant in Detroit. On arrival of the goods at Detroit, the conductor delivered his copy of said way-bill to the checking clerk of defendant in said section, from which said clerk checked said goods from the cars into said section. It was the practice of the Michigan Central Railroad Company, before forwarding such goods, to take from said way-bill in the custody of said checking clerk, in the manner aforesaid, the place of destination and a list of said goods and the amount of accumulated charges, and to collect the same, together with its own charges, of the connecting carrier.

It is difficult to conceive a course of business more nearly identical with that disclosed in the case at bar.

In commenting on that case, and in applying the rule of law there laid down to the facts in the case at bar, his Honor, Judge Showalter, in his dissenting opinion in the Carr, Ryder & Engler case—that involving the through shipment of lumber to Alabama, (R. p. 362) says:

"It will be seen from the foregoing statement that on the course of dealing between the two carriers, *shipping directions had not been received by the connecting carrier.* The Court mentions the mark on the goods, but not as a

controlling factor in the decision. The Michigan Central Railroad Company did not look at the marks on the goods for the shipping directions upon which it acted. Under the mode of dealing between the two carriers, the case was the same as though there had been no marks on the packages. The goods were on the platform of the connecting carrier at the time of the loss. The defendant did not own or have any possessory right over that portion of the connecting carrier's station house. Defendant's servants were not privileged either to unload the goods there or to handle the goods afterwards. The servants of the connecting carrier placed all goods which were to be forwarded, as designated by the agent of the defendant, at a particular locality on the platform in question. The defendant ceased to be and the connecting carrier became the bailee of the goods—*and this before the shipping directions had been given by the one carrier to the other, according to the understood mode of dealing between them.* This was a case in which the defendant did not own or possess the unloading platform. If the defendant had owned or possessed that section of the station where the goods were unloaded, the mere placing of the goods in controversy at a particular locality on the platform, from which the servants of the connecting carrier would afterward, without special license from the defendant, take them, would not have changed the custody of such goods. The law upon this point is clear. Nor would the connecting carrier have become bailee even if its agent had received the shipping directions before the destruction of the goods. The fact that the goods were still in the custody of the defendant would, from the standpoint of the shipper, have determined the matter. I may add, that the Grand Trunk Railway Company had no terminal, that is to say, unloading facilities at Detroit, so far as concerned the owner of the goods in question. The section of the station in which the freight of the Grand Trunk Railway Company was unloaded, was owned and possessed by the connecting carrier. In the case at bar, the connecting carrier not only took exclusive possession of the cars in controversy at the terminus of appellant's rails, but hauled them to a point on its own rails to which appellant had, *neither in law nor by contract, even a right of access.*" (Italics ours.)

It must be remembered that the purpose for which the cars were delivered was not for further transportation on the original contract, *but for storage and re-sale*, and therefore no such strict rule as to delivery of way-bills is required. Opposing counsel admit that the consignees had interrupted their transit, and had agreed (*with somebody*) that the cars should be stored at East St. Louis.

(b) It was immaterial whether the Terminal knew the contents or fresh destination of these cars

Opposing counsel argue that the Terminal could not know the contents of these cars, their destination or who the consignees were, until it had received the new way-bill, and therefore it could not know whether it was holding them for the consignees. We have above made reply to this point and now add: If the Terminal had accepted them, would the fact that it did not know the consignee and the fresh destination, relieve it of the warehouseman's duty to care for them? Would either of those facts change the care and custody back to the receiver, or alter the liability of the Terminal, which attached the moment it accepted the cars? We hardly think a court of equity would release a carrier (which had *actually* accepted cars and taken them into its own exclusive custody) from liability for their care, simply because that

carrier had not yet been notified of the contents and destination. Courts of law have not even gone to that extent, as is shown in *Illinois Central vs. Smyser, 38 Ill., 354.*

But in point of fact, the Terminal company must have known from the first minute of its recorded relations to these cars, not only their contents, but also their destination. The vital fact, fully disclosed in the evidence above, that the Terminal had its "yard clerk" always on hand at the arrival of every train, to note and record the day, hour and minute of the incoming of each car; *each of which was covered by a separate way-bill,* (R. pp. 156, 157, 162) necessarily involved an inspection thereof, by which knowledge of contents and destination, including name of consignee, were all obtained. This conclusion is rendered all the more certain from the fact that such inspection would naturally have been made in order to show which cars were to be handled free, which were to be subject to the fifty cents charge for handling, which were to be sent on at once, and which were to be set to store. Way-bills are all kept together in the caboose at the end of each freight train, and we must assume that the yard clerks were at least ordinarily intelligent.

The record here shows that it was customary for the Terminal to take these cars and to hold them pending re-sale and a fresh destination. The consignees were expecting shipments daily, and for

the very purpose of having them stored so that they could inspect them for samples and until they could dispose of them, they entered into the agreement with the Terminal. The Terminal was to take these cars into custody as fast as they arrived, and were set to their tracks. After the consignees had sold the grain and were ready to give fresh destination, and make a new way-bill, they would be ready to move the grain, and consequently would have no further occasion to store it; the storage was between the arrival and the making by the consignee of a new way-bill; after that the service was carriage, and not storage.

(c) Issuing of way-bill was not necessary to constitute delivery.

It is another contention of opposing counsel that, notwithstanding the actual physical delivery into the exclusive custody of the Terminal, the receiver was responsible for the cars and contents up to the time the consignee issued a new way-bill for them and passed that way-bill on to the Terminal. Our reply here is that *at most* such way-bill is simply evidence of delivery, which may be shown by other competent evidence. Therefore, we insist, as held by the Court of Appeals, that it is wholly immaterial and technical to object, that prior to the fire no new way-bill had been passed over to the Terminal company.

No case can be found in which, for the purpose of delivery, it is held that a way bill is necessary, except where that way-bill is for the purpose of conveying to the connecting carrier information as to the further carriage, in which case always the old and not a *new* way-bill would be handed on. Here the cars were not delivered for further transportation under the original contract, but were for storage, and no ultimate destination could be given to them until the consignees had made a sale of the barley in St. Louis and re-consigned it. For any other purpose, at most, such way-bill is simply evidence of delivery and does not constitute the delivery, and therefore, if actual and physical de livery had been made it can be shown by other evidence. This is established in those cases in which goods are delivered to a railroad company to be held by them awaiting orders for transportation.

In the case of *Illinois Central vs. Smyser*, *38 Ill.*, *supra*, where goods had been placed in a car of the railroad company, with its assent, for the purpose of shipment, the loaded car being under the exclusive control of the company, the Court held that the goods thereby passed into the possession of the company as effectually as if they had been delivered in its warehouse. In that case the same contention was made as to bill of lading not having been delivered as in the case at bar. On that point the Court said:

> "It is not the mere signing of a bill of lading which transfers the possession of freight to the company, but it is evidence that they have received possession. Their possession may be shown by any other legitimate evi. dence."

And that the liability depends upon *actual* delivery, *irrespective* of way-bills or bills of lading, is well established by the decisions of this Court in:

California vs. Compress Co., 133 U. S., 387;
St. Louis Co. vs. Ins. Co., 139 U. S., 223;
Mo. Pac. vs. McFadden, 154 U. S., 155.

IV.

The agreement between the Peoria Company and the Terminal was not a lease or contract by which that company's rails were extended into East St. Louis.

Opposing counsel sought to meet the *prima facie* case of delivery thus made by the receiver, by construing the agreement which existed between the Terminal and the Peoria Company as a lease of the rails of the former to the latter, and upon this base their argument that the cars at the time of their destruction, were still in the possession of the receiver.

We desire to recur to the fact that the rails of the company terminated at a station called Bridge Junction, and did not extend south of the road marded "Stockyards Avenue" on the plat opposite page 100,

in the record. Opposing counsel have assumed from the statement in the first clause of said agreement, where the Terminal Association "undertakes to give the party of the second part terminal facilities at East St. Louis," that the company had no terminal facilities at the terminus of its line. This assumption is unwarranted by the facts. In connection with these shipments it was not considered necessary to show that the receiver had terminal facilities at the end of his line, since they were not expected to be handled in the receiver's yards at the terminus of his rails, but from the first were intended to be "set to" the tracks of the Terminal as the designated place of delivery for storage for the benefit of the consignees. Therefore, no direct evidence of terminal facilities was introduced. However, by a reference to the "plat of railway yards" in this record (R. p. 100) it will be seen at the bottom of the plat, and toward the middle, the beginning of yards marked "J. S-E. freight yards."

"J. S-E" was the common name by which the railway operated by the receiver had theretofore been known. (R. p. 18.) This identity is also shown by the fact that the line of railway belonging to the Peoria Company is designated on this plat as the "Jacksonville Southeastern R. R." These "J. S-E. freight yards" are referred to and identified by the testimony of Roederer (R p. 69), of Phelps (R. p. 74), and of the receiver himself, (R. p. 222). Opposing coun-

sel tried hard to get him to say that he had no terminal facilities, but did not succeed. Therefore, this agreement was not entered into for the purpose of supplying any deficiency in the line of railway which the receiver was operating, or to enable it to comply with its common law obligations as a carrier.

The written agreement between the Terminal and Peoria Company was simply for the purpose of securing a certain and definite rate to be paid to the Terminal for switching through cars to and from the rails of the Peoria Company and other companies in the vicinity of East St. Louis, and to provide beforehand for the ample and quick handling of such through freight, so that the company's own proper terminal facilities would not become clogged or over-taxed by the accumulation there of such through freight in addition to that which was purely local and destined only to and from East St. Louis.

In this connection it is well to consider the nature of the railroad of the Terminal Association, and the character of the business that it solicited and carried on. By a glance at the plat (R. p. 100) it will be seen that the rails of the Terminal connect with all of the many railroads entering East St. Louis; this taken with the name of the Association, points directly to the fact that it is a switching railroad, which serves all other railroads centering in East St. Louis, by delivering cars from one to the other.

As a matter of fact, it could have been shown that the Terminal Railroad Association has the same sort of an agreement with every other railroad entering East St. Louis, as it had with the Peoria Company. Its business with the Peoria Company was part only of its general storage and connecting line business, and all on the same basis, with control of future transportation and "bridge toll" for its motive.

Unless, therefore, it can be said that the mere fact of the Terminal Association being a switching railroad, whose main business is simply the switching of cars from one railroad to another, prevents it from assuming the character and liability of a connecting carrier for the cars while they are in its possession and custody in the course of such transportation from one railroad to another, then, we submit, that the existence of such an agreement as that of August 1, 1892, does not in itself change the relations between the Terminal Association and other railroads from which it receives cars.

In *Missouri Pacific R. R. vs. Grocery Co. 55 Kan. 525*, we find a logical statement of the reason why the mere fact that a railroad is a switching railroad does not relieve it of the liability of a common carrier. In that case a car load of sugar sent from Louisiana was consigned to the plaintiff, a grocery company at Wichita. It was shipped over the Texas & Pacific Company's line and was brought to Wichita by the St. Louis & San Francisco Company. It was there placed on the

"Y" and switched by the defendant company over its tracks to the spur tracks in the rear of the plaintiff's warehouse, for which service the St. Louis & San Francisco Company paid their regular switching charge of two dollars per car. The Court held that the defendant was liable as a common carrier for a loss occurring after it had taken charge of the shipment, and before the plaintiff had had a reasonable time in which to remove it; among other things saying:

> "A railroad transporting a passenger or a car load of freight one mile, using a switch engine for motive power, is just as much a common carrier as if the distance were a thousand miles by regular freight or passenger train. The fact that compensation for this particular service was paid by the St. Louis & San Francisco Railroad Company, while it might render that company also reeponsible, it could not relieve the defendant company from its liability as a carrier."

To sustain the contention of our opponents that the agreement of August 1, 1892, excluded the relation of connecting carrier between the two companies, or that the contract itself made them respectively principal and agent as to the interchange of all traffic between them, it is absolutely necessary to ignore the fourth provision of the contract, which is (R. p. 100-101):

> "Fourth. All cars consigned to and from the East St. Louis freight house of the party of the second part, to be switched to and from the Wiggins transfer tracks without extra charge. Regular switching charges and rules to apply to all other cars to and from connections, the party of the first part to be governed in making its

collections by instructions shown on bill to it, as to who should pay. In the absence of any instructions the switching charges will follow the car.

This clause expressly recognizes and provides for that interchange of traffic which occurs between connecting carriers, and by it provision is made that the regular switching charges and rules shall apply on all cars, to and from connections; that is, that the regular switching charges shall apply to certain cars which necessarily had to pass over the tracks of the Terminal to the tracks of other railroads connecting with the latter.

Now, it is to be remembered, that this contract does not provide that *certain* yards or *any special* place or territory in the yards of the Terminal are to be set aside for the *exclusive* use of the Peoria company, *in the sense that it was to exercise any dominion over or have any possessory right therein.* Nor does the evidence, in fact, show that any particular portion of the yards were set aside for the *exclusive* use of the Company or its receiver.

John Weidmer, of the Gratiot Street Warehouse Company, testified, as shown above, that he rented of the Terminal Association a warehouse which was right in the middle of that part of the Terminal's yards, which opposing counsel refer to as the appellant's "portion" of these yards; that some of the tracks ran through the warehouse; and that he rented

it from the Terminal for the storage of bailed hay, on the understanding that it had full control. (R. pp. 196, 197.) This was the "dangerous fire-trap" referred to by the Master, and in which the fire originated. (R. p. 60, 23, "Ex. 3," 236).

The servants of the Terminal Association may have been accustomed to haul cars from the designated "Ys" to some special territory in its yards, and that territory for the time the cars stood thereon may have been "the yards set aside for the use" of the receiver, within the sense of the second section of the contract, *but such servants did not do this by any direction from the receiver;* nor was any right in him to direct or control them, or to designate the place on the grounds or rails of the Terminal where any car received from his road should be at any given time, in any way recognized. (R. pp. 104, 186.) Judge Showalter very accurately says of these yards that the receiver "had, neither in law nor by contract, even a right of access." (R. p. 363.) *This also was the construction given to the contract and acted on by all parties.*

The agreement will be searched in vain for words of conveyance. There cannot be found in it any transfer from the Terminal to the company of any estate in the grounds or tracks, or any part thereof, or of any possessory interest in its engines, or control over its servants.

The conduct of the Terminal Association at the very fire which caused this great loss, emphasizes the absence of any attempt on the part of the Terminal to make any such transfer by this agreement. As soon as the fire broke out, the receiver had an engine close by on his own rails, and his employees attempted to go in and hitch on to these cars and pull them away from the burning warehouse, but were rudely prevented from so doing by the employees of the Terminal (R. p. 179). The evidence further shows that while a great many of the cars which came off of the receiver's road were set on to certain tracks by the Terminal Association, yet it further shows that this was not always the case, and that the Terminal would take the cars into its own exclusive custody and store them in any part of its vast yards which was most convenient to it, and there mingle them with cars from other railroads, and that, after the Terminal had taken possession of such cars on the designated "Ys," the receiver could in no manner direct the point to which they were to be transported or stored on the rails of the Terminal. (R. pp. 183-6). In fact, as shown by the evidence, cars from other railroads were, at the time of the fire, standing on these same tracks, claimed to have been set apart for the exclusive use of the receiver. (R. p. 197). In other words, the evidence conclusively shows that the receiver had no exclusive use, direction or control over any portion of the Terminal yard.

Therefore, we earnestly submit that the contract in question was only the result of precautionary measures on the part of the Peoria Company for the prompt and adequate handling of *through* freight by its connecting carrier, the Terminal, and *beyond this* was nothing more than *a division of the freight charge between the two connecting carriers*. The cars in controversy were not handled by the Terminal by reason of that contract; the only compensation it was to receive for such cars was the regular tariff to be paid for the new haul, in which it was to be the initial carrier. His honor, Judge Showalter, in his opinion, held (R. p. 359):

> "As said above, the shipper pays no more than if the appellant had himself owned and operated the lines of the Terminal Association. Such a contract could not interfere with or modify the legal obligation of either carrier to a shipper whose goods are handled successively by both. Neither appellant nor the Terminal Association could evade or alter any legal obligation to a third party by any contract between themselves. If the Terminal Association had alienated to appellant an actual ownership or possessory right over that portion of its tracks where the cars in controversy were destroyed, and such a control over its employees and engines that said employees, when engaged in handling the cars in question, were the servants of appellant, and the engine used by them his engine for the time being, the case would be different. On this hypothesis, the tracks where the cars were destroyed would have been appellant's tracks, the employees who hauled the cars to that point his servants, the engine used by them his engine, he would have continued to be the bailee of the property, and the matter of way-bills or junction reports would have signified nothing. But in my judgment, as said, *the contract in question had no force as of alienation* by the Terminal Asso-

ciation to appellant of any possessory right, interest or estate in or over any property of the former company, or of any control over its servants. Neither the relation of lessor and lessee, nor that of licenser or licensee, existed between these parties as resulting from said contract, so far as it concerned the cars and contents in question."

V.

The agreement between the Peoria Company and the Terminal did not make them principal and agent.

It was also argued in the courts below that the agreement of August 1, 1892, between the Terminal and the Peoria Company, made the former the agent of the latter. In the opinion of his honor, Judge Jenkins, it will be seen that he, also, is inclined to this view.

From an inspection of this agreement (R. p. 100) it will be found that the Terminal only agreed to furnish necessary yard room and track facilities in their yards at East St. Louis, for the purpose of handling such freight as might originate on the line of the Peoria Company, or be received by that railway company from other lines, to be carried to St Louis, or points beyond St. Louis, over the rails of the Terminal. For this service the Terminal was to receive the customary charges for the handling of each car, just as any other connecting carrier would receive.

A case quite analogous to the one at bar, is *St. Louis Insurance Company vs. St. Louis, Vandalia, Terre Haute & Indianapolis R. R. Co., 104 U. S. 146.* There this Court held that an arrangement between a Dispatch Company and sundry railroad companies, whose lines terminated at New York, whereby the latter, separately, agreed to carry all goods for the transportation of which the former should contract, at the established tariff rates, did not involve a joint liability on the part of the railroad companies, nor make the Dispatch company the agent of the railroad companies, the Court saying:

> "The Dispatch company and the defendant had, it is true, certain business relations, but those relations did not necessarily involve an agency upon the part of the former for the latter, in the making of contracts for transportation. The agreement between those companies only bound the railroad company to 'receive, load and unload, deliver and way-bill' such freight as was sent to it by the Dispatch company, and at the rates established, not by the latter, but by the defendant and other railroad companies."

To the same effect is *Mo. Pac. vs Grocery Co., 55 Kas., supra,* where the switching railroad was held to be a *connecting carrier* and not an agent.

So, we submit in the case at bar, that the agreement between the Peoria Company and the Terminal only bound the latter to properly take care of and handle all freight which the former might deliver to it on the designated "Y's" and at the rates established, not by the receiver, but by the Terminal.

It might as well be argued that every railroad company which enters into an agreement with a coal company to furnish it so many cars a day, and to haul those cars at a certain price, thereby becomes the agent of the coal company, or thereby leases to it the cars and that portion of the rails necessary to make the haul contemplated.

(a) **The receiver did not pay the Terminal for storing these cars.**

Opposing counsel predicate their "theory of agency" existing between the receiver and the Terminal, as to the handling of these cars, on the unwarranted *assumption* that the receiver paid the Terminal, fifty cents a car. We quote from the petitioner's brief (p. 24):

> "The Terminal company, therefore, acted merely as the *servant or agent* of the receiver in breaking up his trains and placing the cars on certain tracks for which it received from the receiver fifty cents a car. *One railway company does not pay to another railway company fifty cents a car for the privilege of delivering cars to it.*"

The fact that their own witness (R. p. 79) testified that this service of making and breaking trains was a "separate and distinct service" from the storage, and the further fact that no loss occurred during the "breaking" of the trains, or by reason of its negligent performance, renders the matter wholly irrelevant and immaterial, and we submit that there is no basis in this record for the *assumption* that the

appellant paid the Terminal fifty cents a car for these cars. Especially is this so in view of the provision in the contract, that all cars paying bridge toll were to be handled free.

Mr. Phelps testified (R. p. 74) generally that this work was done under a contract at fifty cents per car. The contract referred to (R. p. 100) provides that the work done shall be:

> "at the rate of fifty cents per loaded car in and out, *except cars on which the party of the first part receives a bridge toll, which will be handled free.*"

If, as contended by opposing counsel, all these cars were destined to St. Louis, every one of them would be cars "on which the party of the first part" (the Terminal) would receive a bridge toll, and, in consideration of its receiving such toll, *and not in consideration of payment by the receiver*, the Terminal stored and handled these particular cars. Was, then, such storing and handling, by the Terminal, *for itself*, or as agent of the receiver?

Clearly for itself, as principal. Precisely as it solicited the hay business of Weidmer. And for the same reason that it solicited and secured this business from the grain brokers in St. Louis, solely to prevent its coming down on the west side of the river, or being delivered to the Wiggins Ferry Company, its competitor at East St. Louis, in which events it would have received no toll. (R. p. 239.)

The bridge toll, and the control for purposes of "future transportation," was ample consideration, as we have elsewhere said, for the promise to keep safely, and made them, on their own immediate responsibility, bailees for hire. They were responsible from the moment of the receipt of the cars. *Ducker vs. Barnett, 5 Mo., 97; Turner vs. Huff, 46 Ark., 222.*

VI.

The same rules of law apply as well to cars as to contents.

Opposing counsel say that the claim for the cars destroyed rests on a somewhat different ground than do the claims for barley destroyed. They state the rule correctly as to the system of car book-keeping, and also that where a car has been delivered to a connecting carrier, until such delivery *is so reported*, the car shall stand *charged* to the company last reported as having received it. But there is no agreement between railroads by which a mere *charge* of this kind can *create and establish a liability* for the car. We take it that counsel hardly meant to assert such a proposition. They do, however, further state that if a car is destroyed while on the tracks of that company, such company shall be liable therefor the same as it would be for any other property. To this we assent, because it merely states a well known rule of law.

We therefore submit that the argument of opposing counsel, that there is a liability in the receiver for these cars simply by reason of the fact that there was a failure to *notify* the St. Paul Company of their delivery to the Terminal, and therefore that the St. Paul Company on their car books still had the receiver *charged* with them, is by no means tenable.

If this were so, liability could be created and divested by a simple means of book-keeping, *without ever moving a car a foot.* We know that opposing counsel would not agree if, even in this case, the receiver had sent in a report that these cars had been delivered to the Terminal, that therefore the receiver was relieved of all liability, and that liability was vested in the Terminal.

This is but an argument based upon constructive delivery of the cars by junction reports, and the freight by way-bills. The danger of adopting such a theory is at once apparent, since if it is held that delivery depends upon the issuing of junction reports, and if no junction reports have been issued, no delivery has been made, then a railroad company could divest itself of liability by merely issuing such reports, although, in fact, it had not delivered the cars. The question of liability, both as to cars and freight, is the same, and depends upon the actual possession.

The Supreme Court of Illinois held, in *Peoria Ry. vs. Chicago Railway, 109 Ill., 135*, that a carrier of cars holds the same relation to the cars as it does to the freight, and on the oral argument of these cases in the Court of Appeals, opposing counsel assented to this principle, and we find this case cited in their original brief filed in that court, and in this court.

In *Railway Company vs. Railway Company, 123 Ill., 594*, it is expressly held that if cars had been set on the private delivery track belonging to the consignees, for loading or unloading, then they are in the possession of the consignees, and consequently its liability is interrupted during the time they are so out of its possession. These cars were set on the tracks of the Terminal Association out of the possession and control of the receiver and for the purpose of storage, awaiting a fresh destination from the consignees by express agreement between them and the said Association. The case cited originated at East St. Louis, and seems much in point, not only as to cars, but also as to contents.

In the case of *Peoria & Pekin Union vs. Rolling Stock Company, 136 Ills., 643.* confirming *Connecting Railway Company vs. Railway Company, 123 Ills., supra*, the reasoning of the opinion is so potent, and so applicable to the cases at bar, that we refer it to this Court with confidence. There a transporting company delivered loaded cars to a terminal and switching com-

pany, to be set for unloading on tracks of the latter adjacent to the warehouse of the consignee. After the cars were unloaded by the consignee, the terminal company was to return them to the transporting company. While standing on the tracks of the terminal, adjacent to the consignee's warehouse, the cars were destroyed by fire.

In reversing the judgment of the lower court, holding the terminal company liable for the cars, the Supreme Court (p. 651) says:

> "Having nothing to do with the unloading, and having delivered the cars on the track at the refinery, its whole duty as a common carrier of the freight contained in the cars was at an end. The transit of the goods had terminated, and the cars on the track were so far delivered into the control of the refinery as to enable it to discharge the freight. * * * Appellant *had no control of the time such cars should remain* at the refinery for such purpose—*that*, it would seem from the course of business, *was in the discretion of the consignee of the freight.*
>
> * * * * * * * * *
>
> By the terms of the contract of carriage, the control of the goods ceased absolutely by the delivery to the consignee on the track, and was suspended, *as to the cars*, for an indefinite period, the duration of which was to be determined, *not by appellant, but by the consignee of the goods.*"

The cars here involved were also, according to the established course of business, set to tracks selected by the consignees, although not for unloading, but nevertheless to await a sale of contents by the consignees, and a new consignment under a new and independent contract of carriage, and, therefore, just as

much for the convenience and benefit of the consignees. The receiver "had no control of the time such cars should remain" on such tracks, since that was absolutely "in the discretion of the consignee of the freight." We confidently submit that this case would be conclusive in our favor if the cases were pending in the same court.

VII.

The opinions of the majority of the Court of Appeals are not opposed to each other.

It was alleged by the petitioners as a reason why *certiorari* should be granted, that the opinions of the majority of the Court of Appeals are not entitled to any strong presumption of correctness because they are opposed to (1) each other, and (2) to the opinion of the District Judge in the Circuit Court.

We do not believe, however, that a consideration of the opinions delivered by Judges Woods and Showalter, the two judges constituting the majority of the Court of Appeals, will sustain the assertion that they are opposed to each other.

It is to be remembered that in the two lower courts four appeals were submitted and considered together. These appeals, by stipulation, covered many other cases pending in the Circuit Court. The four

cases submitted to the Court of Appeals presented two classes of shipment—the three involved in this discussion were barley shipments consigned to St. Louis brokers to be sold on "change," and the fourth case was a through shipment of merchandise destined to Alabama.

The major part of the opinion of Judge Woods consists in a consideration of the three cases of barley shipments, and he, with the full support of Judge Showalter, reverses the decree of the Circuit Court which held the receiver liable for such shipments, on the ground that a certain agreement, quoted above, had been entered into between the consignees and the Terminal Association, whereby the latter was to hold these barley shipments on its rails in East St. Louis for the purpose of giving the consignees an opportunity of selling the same in the market, and thereafter give to the shipments a new destination. As to the other, Carr, Ryder & Engler case, involving a through shipment of merchandise, Judge Woods simply held that inasmuch as said agreement did not have any application to it, the decree of the Circuit Court should be affirmed.

The major part of the opinion of Judge Showalter consists in a consideration of the liability of the receiver in the case of this through shipment, and in demonstrating that the agreement of August 1st, 1892, entered into between the Terminal and the Peoria

Company did not constitute a lease of the rails of the Terminal, nor make the Terminal the agent of the receiver, in opposition to the position taken by Judge Jenkins (not Judge Woods) that said agreement did accomplish such object.

The only opposition in the opinions of Judges Woods and Showalter is in the disposition of the Carr, Ryder and Engler case—Judge Woods being of the opinion that the receiver was liable, and Judge Showalter that he was not liable. That case, however, is not before the Court on this hearing.

But in our brief therein we endeavored to show, and we hope to the entire satisfaction of this court, that Judge Showalter was right, both on authority and fact.

In the consideration of these points it must always be borne in mind that two different classes of cases were disposed of. On the barley question we have Judges Woods and Showalter concurring and constituting a majority, and in the through shipment case, we have Judges Woods and Jenkins concurring, and therefore constituting a majority.

VIII.

The decision of the Court of Appeals herein is not in conflict with other decisions.

As another ground for reversal, opposing counsel contend in their brief that the decision of the Court of Appeals in this case is in conflict with:

Pratt vs. Railway Co., 95 U. S., 43.

Covington Stock Yards Case, 139 U. S., 128.

Texas & Pacific Ry. Co. vs. Clayton, 51 U. S. A., 676.

Mt. Vernon vs. Alabama Ry., 92 Ala., 296.

Palmer vs. C., B. & Q., 13 Atlantic Reporter, 818.

The decision in the case at bar is: (1) that where barley shippers consign car loads of barley to commission merchants without notifying the railroad company that they, the shippers, are still the owners, the consignees have the right to change the original destination of the shipment; (2), that where the consignees enter into an agreement with a terminal railroad, by which the latter is to receive such barley shipments from a carrier and hold them in free storage for the convenience of the consignees, and until the latter shall make sales of such barley on a grain exchange, there has been a sufficient delivery of such shipments by the connecting carrier to the Terminal

railroad, when, pursuant to custom, the connecting carrier deposits such cars on certain designated "Y's" of the Terminal and the latter takes exclusive physical possession and control of such cars by attaching its own engines to them and hauling them to a point on its own rails, there to await the convenience of the consignees.

In *Pratt vs. Railway Company, supra*, this Court expressly recognized and announced the principle that where by custom or agreement there is a designated place of deposit between two connecting carriers, delivery is made by such deposit, although shipping directions had not as yet been delivered from the first to the second carrier.

The *Covington Stock Yards case, supra*, involved, as we have fully shown above, a controversy entirely different from the one at bar. Judge Showalter also said of this case (R. p. 359):

> "In the *Covington Stock Yards case, 139 U. S., 128*, it was ruled, in effect, that a carrier bringing cattle to a consignee who had provided himself with structures connecting his yards with the railroad track, whereby cattle might be unloaded directly from the cars into his yards, could not refuse to unload the cattle of such consignee into the yards, and by means of the appliances provided by him, for the mere purpose of compelling him to pay a terminal fee at the cattle yards provided by the company, or provided by an independent corporation. This case, as I can see, has not here the application or significance suggested by counsel for appellees. Of the cars in question, one was to go to Birmingham, Alabama, the others, loaded with barley, to different points in and

about St. Louis, as directed by the consignees. Appellant did not engage to furnish unloading facilities for these cars. He was under no obligation to these appellees to provide terminal facilities for unloading. He handled the cars of freight as an entirety."

To this we desire to add the further suggestion, that the receiver not only did not engage, nor in any way was such obligation upon him, to furnish unloading facilities for these cars, but from the very nature of the business, it was never intended that these cars should be unloaded in the yards of any railroad. They were barley, consigned to commission brokers, who sold them on "change" to brewers and other consumers, to whom the cars would be dispatched, and in whose malthouses they would be unloaded.

The case of *Texas & Pacific vs. Clayton, supra*, is in perfect harmony with and follows that of *Pratt vs. Railway Company, supra*, and therefore, we submit, is also in harmony with the decision of the Court of Appeals in this case. There the Court says:

"It may be safely affirmed as a proposition applicable to all the cases, that a deposit of the goods, with notice *expressed or implied*, at any place where the second carrier has control, conformable with the usage created by the course of business between two carriers, is a sufficient delivery and discharges the first carrier."

This is the exact principle which the Court of Appeals applied to the facts in the case at bar.

In *Mt. Vernon vs. Alabama Southern R. R., supra*, the Alabama court holds that there can be no delivery

from one connecting carrier to another, unless the second carrier has received full shipping directions. This, no doubt, is the general rule. We submit, however, that, even if the court in that case had had an opportunity to pass upon the exception to the rule, which is founded on agreement and custom, and had directly refused to have held that a deposit of freight pursuant to custom and agreement by one connecting carrier on the premises and within the physical possession and custody of the other, was a sufficient delivery to have transferred the carrier's liability, any such decision would have been in direct conflict with that of this Honorable Court in *Pratt vs. Railway Co., supra*. The Court of Appeals in this case would then have had to render a decision either in conflict with the Supreme Court of Alabama, or with the Supreme Court of the United States.

We have not the case of *Palmer vs. C., B. & Q., supra*, before us, which opposing counsel contend conflicts with the decision in the case at bar. However, for the purpose of this argument, we may concede all that opposing counsel contend for as to such conflict, and the Court of Appeals would only have found itself in the same predicament as to choosing between a decision which is in conflict with a State court, or one which is in conflict with the Supreme Court of the United States.

IX.

The original consignees are alone entitled to bring suit.

The claims for the loss of these goods are all presented by the original consignors. Our contention is that if any liability exists, either as warehouseman or carrier, by the receiver or the Terminal Association, such liability is to the original consignees, and not to the original consignors.

(a) The right to possession is in the consignee.

In the claims of the interveners, Jacob Rau and Henry Rippe, the shipments were made to the Orthwein Grain Company, for sale on commission (R. pp. 291, 302). The carrier, however, was not informed that the Orthwein Grain Company (consignee) was not the owner (R. pp. 293, 303). Under the contract of carriage the consignee was entitled to possession and alone is entitled to sue.

In *Hardy vs. Monroe, 127 Mass., 64*, it was held that one who consigns goods to another to be paid for only as they are sold by him, has not such immediate possession or right to immediate possession as will support an action of tort for the conversion of the goods. The court there said:

"The uncontradicted evidence was that the goods alleged to have been converted were consigned by the plaintiff to one Harvey, to be paid for only as they were sold by him. This gave the legal possession of the property to the consignee.

Fairbanks vs. Phelps, 22 Pick., 535."

The uncontradicted evidence in these two cases is that the goods were consigned to the Orthwein Grain Company to sell on commission, with no understanding as to when they were to be paid for.

(b) Where the consignor has parted with his interest in the goods, and the actual owner is the consignee, the latter alone is entitled to bring suit.

In the claims of all other (than Rau and Rippe) interveners, the barley shipments were made pursuant to telegraphic correspondence between the interveners and the consignees. This correspondence constituted a bargain and sale, and by it the interveners parted with all their interest in the barley upon delivery to the initial carrier.

There is abundant authority to sustain the doctrine that, where the consignor has parted with his interest in the goods, and the actual owner is the consignee, the latter alone is entitled to bring suit.

Blum vs. The Caddo, 1 Wood, 64.
Griffith vs. Ingledew, 6 S. & R., 429.
Potter vs. Lansing, 1 Johnson, 215.
Greene vs. Clarke, 12 N. Y., 343.

Krulder vs. Ellison, 47 N. Y., 36.

Canfield vs. Northern Railway Co., 18 Barbour, 586.

Gwyn vs. Richmond Ry. Co., 6 Amer. Eng. R. R., 452.

Everitt vs. Sautes, 15 Wendell, 474.

S. & N. Alabama Ry. Co. vs. Wood, 72 Alabama, 451.

Denver Ry. Co. vs. Frame, 6 Col., 582.

Dunlap vs. Lambark, 6 Cl. Fin., 600.

Dutton vs. Solmonson, 3 B. & P., 582.

Dawes vs. Peck, 8 T. R., 330.

Distillery vs. Railway, L. R., 7 H. L., 269.

King vs. Meredith, 2 Camp., 639.

"As a general rule, the consignee is considered the person *prima facie* entitled to sue for loss or injury to goods shipped, as the law intends that by delivery to the carrier the title to the goods vests in the consignee."

3 Ency., Pleadings and Practice, 829.

Authorities cited in note 3.

"Where goods are sent by vender to vendee, the delivery of them to carrier usually vests the property in the latter, and he is the person to sue the carrier for them."

Fragrano vs. Long, 4 Barn & C., 219.

Stanton vs. Eager, 16 Pick., 469.

Brown vs. Hodgenson, 2 Camp., 36.

Abbott on Shipping, 326.

"The mere fact that the person is named as consignee in a bill of lading is such presumptive evidence of ownership in him, in the absence of any showing to the contrary as will entitle him to sue."

3 Ency., Pleadings and Practice, 830.

Lawrence vs. Minturn, 17 Howard, 100.

Butler vs Smith, 35 Miss., 457.

Griffith vs. Ingledew, 6 S. & R., (Pa.) 429.
Arbuckle vs. Thompson, 37 Pa. State, 170.
Blanchard vs. Page, 8 Gray, (Mass.) 289.
Harrison vs. Hixon, 4 Blackfd, (Md.) 226.

Touching this question, the Supreme Court of the United States, in *Grove vs. Bryan, 8 Howard, 429*, said:

> "The effect of the consignment of goods generally is to vest the property in the consignee; but if the bill of lading is special to deliver the goods to A for the use of B, the property vests in B, and the action must be brought in his name in case of loss or damage."

It is definitely settled in Federal Courts that an action for loss or damage must be brought in the name of the party in whom the title to the goods is vested.

Again, in *Lawrence vs. Minturn, 17 Howard. 100*, the Court said:

> "The first question to be determined is whether the libellant had the right to sue in his own name."

After discussing the facts in evidence, the Court proceeds:

> "Upon the proof, we are of the opinion that the libellant had a right to sue the carrier in his own name. He is the consignee named in the bill of lading, and in the absence of evidence to the contrary, the property is presumed to be in him. In *Evans vs. Marlett, 1 Lord Raymond, 271*, it is laid down that, 'If goods by bill of lading are consigned to A, A is the owner and must bring the action against the master of the ship if they are lost, but if the bill be special, to be delivered to A, to the use of B, B ought to bring the action.'

"Whether it be strictly correct to affirm that in the case first put, A shall have the right of action against the carrier; though in point of fact he is only an agent for the consignor, has been much controverted. In *Griffith against Ingledew, 6 S. R., 429*, goods were shipped by A for his own account and risk, but deliverable under the bill of lading to B or his assigns. The previous decisions were examined with great care. There was a difference of opinion on the bench. *Mr. Justice Gibson dissenting.* But the majority of the court held that by force of the bill of lading the legal title was in the consignee, and he should maintain the action.

"Since that decision was made, the question has been much discussed both in this country and in England. It is not easy to reconcile the decisions. We shall not attempt to do so here: the case does not require it, for, if we take the rule to be that an action against the carrier cannot be brought by a consignee who has no beneficiary interest in the goods, it still remains true that the presumption of such an interest in the consignee arises from a bill of lading which makes the goods deliverable to him or his assigns."

In the case of *Merchant's Dispatch vs. Smith, 76 Ill., 542*, the court said:

"The first point relied upon by appellant is that the consignee of the goods could not maintain a suit for the loss; that the action should have been brought in the name of the consignor. Where goods are consigned without reservation on the part of the consignor, the legal presumption is the consignee is the owner. *Angel on Carrier, Sec. 497.* This Court held in *Diversy vs. Kellog, 44 Ill., 114*, that when goods were delivered to a carrier under a contract of sale, the title to the property vests in the consignee, subject to *stoppage in transitu*, but with no other lien unless expressed in the terms of the sale. We are therefore of the opinion that the title to the goods shipped was in appellees, and the suit for the loss was properly instituted in their name."

The only attempt made by opposing counsel to avoid the conclusion which inevitably follows from the foregoing adjudications, is an argument to the effect that the bargain and sale was for delivery in St. Louis. Some of the correspondence between the intervener, the Huntting Elevator Company and the Teichman Commission Company, is quoted and relied on to support their contention. The only telegram which contains any reference to delivery at St. Louis is one from the Elevator Company to the Commission Company asking for best bid on barley. This was dated Sept. 20, 1894, and there is nothing in the record to show that any response was made to it, much less that *any* barley was sold pursuant to it (R. p. 301). To make a showing opposing counsel are compelled to stretch their imagination far enough to attribute a *telegram* sent *twelve* days later as a reply. (Petitioners' Brief, p. 61).

If, however, the sale was originally made for delivery at St. Louis, this very consignee, having the right to change the point of delivery, did change it to the yards of the Terminal Association at East St. Louis, where these particular shipments had been received and were held in storage for the convenience of the consignee at the time of fire. (R pp. 239, 240, 241).

In this same connection opposing counsel seek to sustain the right of action in the consignors, by an

attempt to show that the title to the grain had not passed to the consignee at the time of the fire. In the Huntting Elevator case they argue that the intention of the parties is clearly apparent, and by reason of the fact that the consignee compelled the consignor to replace the lost barley, that both parties treated this barley as belonging to the consignor until it reached St. Louis.

Undoubtedly the intent of the parties, as to when the title passes, will control, *provided* that intent is in any manner expressed in the contract *made at the time of the transaction*. If the intention is *not* clearly expressed then the court will apply well settled rules of interpretation. The correspondence between these parties, which is the only contract in existence, will be searched in vain for one word by which it could be construed into a *conditional* contract. Not a word is found by which the seller could be compelled to deliver the barley at St. Louis. The nearest approach is the use of the words "to be *shipped* to us here"—*not* "to be *delivered* to us here," and "via East St. Louis," which appear in but two instances. These were mere shipping directions, and were so considered by the parties *at the time*. Teichman wires Gilchrist & Company: "Route shipments via East St. Louis, * * * * * " to which Gilchrist replies: "Shipping directions received, etc.,"

and again Teichman wires Gilchrist: "Accept five thousand more, fifty-six net, same shipping directions." (R. p. 289, also 325).

Therefore, we submit, that there was no condition precedent for delivery at East St. Louis, but that the title to the barley passed to consignees upon delivery by the consignor to the initial carrier. Opposing counsel ignore the fact that the intent of the parties, which controls, is the interest which was manifested when the transaction occurred, and seek to apply the principle to facts indicating an interest subsequent to the loss.

We submit that after the contract had been executed, and after the relation of warehouseman had been created, by the acts of the parties thereto, between the consignees and *either the receiver or the Terminal*, rights of a third party had intervened, and it was impossible thereafter for the parties to the original contract to alter the same so as to enable one of them (the consignor) to hold the third party as a carrier, when otherwise the third party would only be liable as a warehouseman, and then only to the consignee.

In view of the decision of this Honorable Court in *Railroad vs. Knight, 122 U. S., supra.* where, under very similar circumstances, it was held, because of the relation of warehouseman existing between the

railroad and one of the parties to the shipment, the other party to the shipment, who had sued the railroad as a carrier, could not recover, because the facts in the case showed simply a liability as a warehouseman to the first party to the shipment, it becomes very material, therefore, that the question of ownership should be strictly determined.

The intention not being clearly expressed in the contracts, we submit that, construed by the well settled rules of interpretation, the title had passed to the consignees, and whoever held the goods at the time of the fire, held them for the consignees as warehouseman, and these suits cannot be maintained.

CONCLUSION.

At the conclusion of opposing counsel's brief filed in the application for *certiorari*, an appeal is made to this Court, based on their own bad judgment in suing the wrong carrier. Citing the predicament of Bromley in *Midland Ry. vs. Bromley*, 8 *J. Scott*, 372, and as usual charging his last sad plight to the Court and not to the error of his counsel, they ask this Court, solely for the purpose of saving their clients, to unjustly charge the receiver with the loss. If they have deliberately turned their back upon a plain, well defined and highly equitable right of action against

the Terminal Railroad Association, through whose gross negligence the loss was occasioned, and which right of action still exists, and in the end find themselves in Bromley's condition, surely, they have nobody but themselves to blame.

The Court will not, however, look in vain for the motive which impelled counsel to select for an opponent in these suits the receiver, representing a small bankrupt railroad, instead of the Terminal Association, a large and powerful corporation, virtually controlling all entrances to St. Louis, and capable of hitting back in the most vigorous way. From the beginning of this litigation, the record shows assiduous and deliberate co-operation between the Chicago, Milwaukee & St. Paul Railway, the one *prima facie* liable as the initial carrier, and the Terminal Association, clearly liable as the carrier upon whose rails and through whose gross neglect the loss occurred, for the inequitable purpose of imposing the liability on this respondent (R. pp. 97, 126, 170).

Upon reference to the many "Station Receipts" and "Bills of Lading" introduced in evidence by the initial carrier and principal intervener, the St. Paul Company, in its own behalf and in behalf of the other interveners, its immediate patrons, it will be at once seen by the Court that it will be impossible to hold the receiver, liable either for the loss of the St. Paul

cars, or for their contents, unless the Court ignores, utterly, the very conditions which the St. Paul Company sought, in the first instance, as the initial company in a through route, to impose upon its own shippers, the other interveners, and permits it, as against a subsequent carrier, to repudiate every rule and express stipulation uniformly laid down by it for the limitation of its own liabilities.

The initial carrier, as forwarding agent of the consignors, had power to bind the latter.

5 Am. & Eng. Ency., 2 ed., 408.

These "conditions and rules," purporting on their face to be part of every contract of through carriage, were in every "receipt" and "bill" passed on with the freight in transit, by the St. Paul Company, over the signature of its agent, to connecting lines. They are as follows:

STATION RECEIPTS AND WAY-BILLS.

"Received from W. W. Cargill Co., bulk barley, * * * to be transported by the Chicago, Milwaukee & St. Paul Railway Co., over the line of this railroad to their warehouse at....., *ready to be delivered* at said warehouse to the consignee or owner, and if the same are consigned to any point beyond the line of this company's road, *ready to be delivered* at said warehouse to the next connecting company or carrier, it being expressly agreed that the said property is to be transported upon and in all respects subject to the conditions printed and endorsed hereon, which regulations and conditions form a part of this contract, and the acceptance of this contract is to be deemed evidence of notice of such regulations and conditions to and of assent thereto by the shipper, con-

signee and owner of said property; AND IT BEING FURTHER EXPRESSLY AGREED THAT THIS COMPANY ASSUMES NO LIABILITY, AND IS NOT TO BE HELD RESPONSIBLE AS COMMON CARRIERS,

For any loss of or injury to said property, after its arrival at its warehouse aforesaid,

Or for any loss or damage thereto, or any delay in transportation or delivery thereof by any connecting or succeeding company or carrier.

(Signed) J. C. HEITBAHN, Agent."

"ON BACK."

"8. *The corporation will only be liable as warehousemen after the property has been placed in their depot. But for loss or damage to property by fire while in their freight depot or warehouse, the company will not be liable.*

12. *GOODS OR PROPERTY CONSIGNED * * * * TO ANY POINT OR PLACE BEYOND ITS TERMINI WILL BE SENT FORWARD WITH AS REASONABLE DESPATCH AS THE GENERAL BUSINESS OF THE CORPORATION AT ITS WAREHOUSE WITHIN MENTIONED WILL ADMIT, BY A CARRIER OR FREIGHTMAN, WHEN THERE ARE SUCH KNOWN AT SAID WAREHOUSE, WILLING TO RECEIVE THE SAME UNCONDITIONALLY FOR TRANSPORTATION, THE COMPANY ACTING FOR THE PURPOSE OF DELIVERY TO SUCH CARRIER OR FREIGHTMAN AS THE AGENT OF THE CONSIGNOR OR CONSIGNEE, AND NOT AS CARRIERS.*

THE COMPANY WILL NOT BE LIABLE OR RESPONSIBLE FOR ANY LOSS, DAMAGE OR INJURY TO PROPERTY AFTER THE SAME SHALL HAVE ARRIVED AT THE WITHIN-MENTIONED COMPANY'S STATION FOR DELIVERY TO THE OWNER, CONSIGNEE, OR TO THE CONNECTING CARRIERS OR FREIGHTMAN FOR TRANSPORTATION." (R. pp. 35, 40, 109, 112, 151, 155, 162, 254, 269).

BILLS OF LADING.

"* * * * *IT IS FURTHER ESPECIALLY AGREED THAT FOR ALL LOSS AND DAMAGE OCCURRING IN THE TRANSIT OF SAID PACKAGES, THE*

LEGAL REMEDY SHALL BE AGAINST THE PARTICULAR CARRIER OR FORWARDER ONLY, IN WHOSE CUSTODY THE SAID PACKAGES MAY ACTUALLY BE AT THE TIME OF THE HAPPENING THEREOF, IT BEING UNDERSTOOD THAT THE SAID CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY ASSUMES NO OTHER RESPONSIBILITY FOR THEIR SAFE CARRIAGE OR SAFETY THAN MAY BE INCURRED ON ITS OWN ROAD." (R. pp. 40, 112, 254).

These rules and conditions are not unreasonable. The last rule, especially, has the express sanction of this Court. They afford all needed protection to and are perfectly fair as between the several carriers making up the through route. And they inure to the benefit of each succeeding carrier in the line.

Manhattan Oil Co. vs. Camden & Amboy Railroad, 54 N. Y., 197.

Camden & Amboy Railroad vs. Forsythe Bros., 61 Pa. St., 81.

Taylor vs. Little Rock Railroad, 18 Am. & Eng. Railroad Cases, 590 596, and Notes.

Whitworth vs. Erie Railway, 6 Am. & Eng. Railroad Cases, 349.

Western Railway vs. Harwell, 91 Ala., 340.

Moghee vs. C. & A. Railroad, 45 N. Y., 514.

Lawson, Contracts of Carriers, 362 et seq.

Let it be always noted that the particular station receipts, way-bills and bills of lading, from which the above quotations are made, purport to be either originals or duplicates, and were placed in evidence by the interveners. (R. pp. 31, 105, 129). If the shippers

had not expressly, or by their course of business, assented to the said rules, stipulations and exemptions, they, equally with the St. Paul Company, are estopped in equity and all good conscience from repudiating them, by their subsequent course in preparing, receiving and using them as evidence of their contract and in support of their claims for loss filed against the receiver.

Even admitting, for argument's sake, that they were defective in execution, or that they had not been read and accepted by the shipper, or that they were absent entirely, surely the loss occasioned by any such neglect, failure or default should fall rather upon the initial carrier, whose duty it was to look after such details, than upon the succeeding carrier, which had a right to presume that proper receipts and bills had been taken and that they were in all respects customary, regular and in order.

The initial carrier was bound to the exercise of reasonable care and diligence in the premises.

Northern R. Co. vs. Fitchburg R. Co., 6 Allen 254.

Why should a court of equity refuse to the receiver, at least as against the St. Paul Company if not as against all the interveners, the full protection of all such reasonable stipulations and exemptions as it

has invoked in support of its claim against the receiver, and which it took, or should have taken, for its own protection as a common carrier.

Upon their face the foregoing stipulations constitute a perfect defense to these suits. If defective or ineffective for purposes of defense, by whose neglect and default was this permitted primarily to occur?

It is immaterial whether the shippers had any specific knowledge of the restrictions contained in these bills of lading, station receipts, and way-bills, since they have placed them in evidence as the contract of carriage upon which they seek to hold the carrier. They can not recover on a portion of this contract and repudiate the other portion. They are estopped to deny them or to attack or discredit them.

According to the English cases, and to a clear preponderence of authority in the United States, if a bill of lading is accepted by the shipper without objection, he is ordinarily presumed to have knowledge of, and to have assented to its terms, and he cannot afterwards be heard to say that he did not read it, but will be bound thereby.

This is the established rule both in Iowa and Minnesota, and the *lex loci* as to all the shipments herein from these States, *4 Am. and Eng. Ency., 2 Ed., 516*, but is not the rule in Illinois and Wisconsin, *Ib. 518*, nor in the United States Courts. *Mich. vs. Mineral Springs, 16 Wallace 318.*

Either the clause exempting the carriers from loss by fire after the goods had been warehoused, as provided in the station receipts, or the stipulation upon the face of the bills of lading that the "legal remedy shall be against the particular carrier or forwarder only in whose custody the said packages may ACTUALLY be at the time of the happening thereof," constitute, for the receiver, upon the facts of this case, a perfect equitable defense.

And this is true without reference to the question as to whether the contract of carriage was or was not a through contract, for the reason that the evidence conclusively establishes the fact that the goods had reached their destination, and that the contract of carriage, so far as the receiver was concerned, only bound him to the safe carriage of the barley from the beginning of his rails at Pekin, and to the delivery at the end of his rails at East St. Louis. If a through contract, the parties thereto were the St Paul and Rock Island companies and the receiver, and the through rate covered not only the transfer through Peoria over the Peoria & Pekin Union rails, but also the ultimate transfer over the rails and bridges of the Terminal Railroad Association from East St. Louis to St. Louis (R. pp. 128, 130, 131). The Terminal Association took its share of the through rate, and was bound to the conditions of liability in the event of ACTUAL CUSTODY.

The testimony is overwhelming that the exclusive and actual custody of the goods, including the cars of the St. Paul company, was in the Terminal Association. The Terminal Association is therefore bound as fully as the St. Paul company by the express terms of the orignal contract of carriage.

On the other hand, if there was no through contract, the decision of the Supreme Court of the United States in the case of *Railroad Co. vs. Manf. Co., 16 Wall, 318*, reaffirmed in *Insurance Company vs. The East St. Louis, Alton & Terre Haute Railroad Company, 104 U. S., supra*, establishes the proposition that the obligation of a carrier to the public should be limited by the termini of its own route. This is the well settled rule, often declared by this Court, and is written on the face of all the bills of lading involved herein.

The termini of the route of the receiver were unquestionably Pekin, Illinois, and East. St. Louis.

Even if we admit the strenuous contention of opposing counsel, that St. Louis and not East St. Louis was the destination of the barley, their case is not in the least helped.

For it is apparent that the legal obligation resting, in that event, upon the receiver, as carrier, was only to carry safely from the beginning of his rails at Pekin to the end of his rails at East St. Louis,

and there safely deliver to the next connecting carrier, which could only have been either the Wiggins Ferry or the Terminal Company. That the latter company was the designated connection appears fully from the evidence, frequently referred to herein, showing that the Terminal Company had solicited this business directly in its own behalf, from the consignees, and that the latter had especially selected it, as against the Wiggins Ferry Company, to receive the barley from the receiver and hold the same pending specific instructions from the consignees as to some more definite point of delivery in St. Louis, or elsewhere,

Whether the consignees were the owners, or the agent of the owners for the re-sale of the property upon commission, in either case, they had agreed with the Terminal Railroad Association for storage pending such resale, and were the parties responsible for further and final directions (often given directly to the Association) as to fresh destination and the particular place of delivery, to be designated by them. Such further transportation, as shown by the testimony, was always controlled by the Terminal Association as a common carrier, and with which the receiver had no concern, except as the mere agent through whom the consignee, in some instances, delivered his directions to the Association. The new way-bill, which was prepared by or under the directions of the consignee, which might have been given immediately or

after an indefinite delay, was not a continuation of the original carriage, or incident thereto, but was a new bill altogether, made after the sale of the property, and constituted, therefore, a new contract, with which the receiver had no concern, either as bailee or as common carrier.

Beyond all doubt, when the cars arrived at East St. Louis and were set to the designated "Ys," and were thence hauled by the Terminal to its yards and there deposited on its tracks in the place required, in the usual course of the consignee's business, for their convenience and subject to their disposal, carriage and delivery were alike complete. The fact that the barley, like other grain in bulk, and like hard coal, pig iron and salt, was for sale or re-sale in bulk to consumers, and after such re-sale was subject to further transportation to the particular brewer in St. Louis, or to Heinz' brewery, East St. Louis, or to Highland, or to Belleville, Illinois, or to the St. Louis breweries, did not in the least change the fact that the original contract of carriage had been fully executed, and the goods delivered, and that a second contract, to cover the fresh destination, was necessary and was made, wherein the consignee became the consignor and the purchasing consumer became the consignee. Nor does it matter whether the new way-bill covered a haul over the Eads bridge or the Merchants' bridge to some malthouse in St Louis, or over some other railroad to the

brewery in East St. Louis, or out in Illinois at Highland, or at Belleville, it is clear that all such points were beyond the receiver's lines, and that he had no interest in and owed no duty, either as carrier or warehouseman, in that behalf.

Finally, upon a most attentive study of this involved and often puzzling record, we submit:

1. That the confusion as between St. Louis and East St. Louis as place of destination grow out of the apparent ignorance of the shippers that East St. Louis was the port of entry for St. Louis—the distributing point for the consignees, pending re-sale on the market in St. Louis, for a fresh and final destination and carriage.

2. Independent, therefore, of the question as to whose possession the cars and contents were in, at the time of the loss, they were being held solely as warehouseman.

3. The receiver is sued as a carrier and recovery cannot be sustained against him as a warehouseman. In any event the liability was to the consignees and not to the consignors.

4. If any liability existed it was that of a warehouseman on the part of the Terminal Association to the consignees.

5. Until the receipt of the new way-bill by the Terminal Railroad Association, it held the goods as bailee for the consignee; after the receipt of the new bill it held them as common carrier. In either case no liability could fairly attach to the receiver.

6. In any event, upon any view of the evidence, it would, we confidently submit, be highly inequitable to hold the receiver responsible for the cars and contents while they were in the actual possession and exclusive custody of the Terminal Railroad Association, through whose negligence the loss occurred, while acting, in its own interest, on a direct agreement with the consignees.

Respectfully submitted,

Lilly Ford Wilson

Philip Barton Warren

Solicitors for Respondents.

Supreme Court of the United States.

No. 11.—October Term, 1900.

The Chicago, Milwaukee and St. Paul Railway Company, Petitioner,
vs.
C. H. Bosworth, Receiver of the Chicago, Peoria and St. Louis Railway Company, et al.

On writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

[December 17, 1900.]

Mr. Justice White delivered the opinion of the Court.

The decision of the controversy presented in this record is controlled by the principles announced in the opinion just delivered in *Huntting Elevator Company* v. *Bosworth*, number 12 of this term. The claim of the railroad company was for the value of certain cars, admittedly owned by it, which had been received by the Peoria Company at various times on and prior to October 28, 1894, from a connecting carrier, upon shipments of barley from various points to commission merchants in St. Louis, the cars, except in one or two instances, being routed on the way bills to East St. Louis. The cars so taken by the Peoria Company were deposited on the tracks at East St. Louis set apart for the use of the Peoria Company under the circumstances disclosed in the opinion in the Huntting Elevator Company case, and, while awaiting orders from the consignees for further movement, were destroyed in the fire of October 28, 1894. The Circuit Court entered a decree in favor of the railroad company, but this decree was reversed by the Circuit Court of Appeals.

For the reasons stated in the opinion in the Huntting Elevator Company case, *the decree of the Circuit Court of Appeals must be reversed and the decree of the Circuit Court of the United States for the Southern District of Illinois affirmed.*

True copy.

Test:

Clerk Supreme Court, U. S.

AGREED RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1895.

No. 284 68 12

THE HUNTTING ELEVATOR COMPANY, PETITIONER,

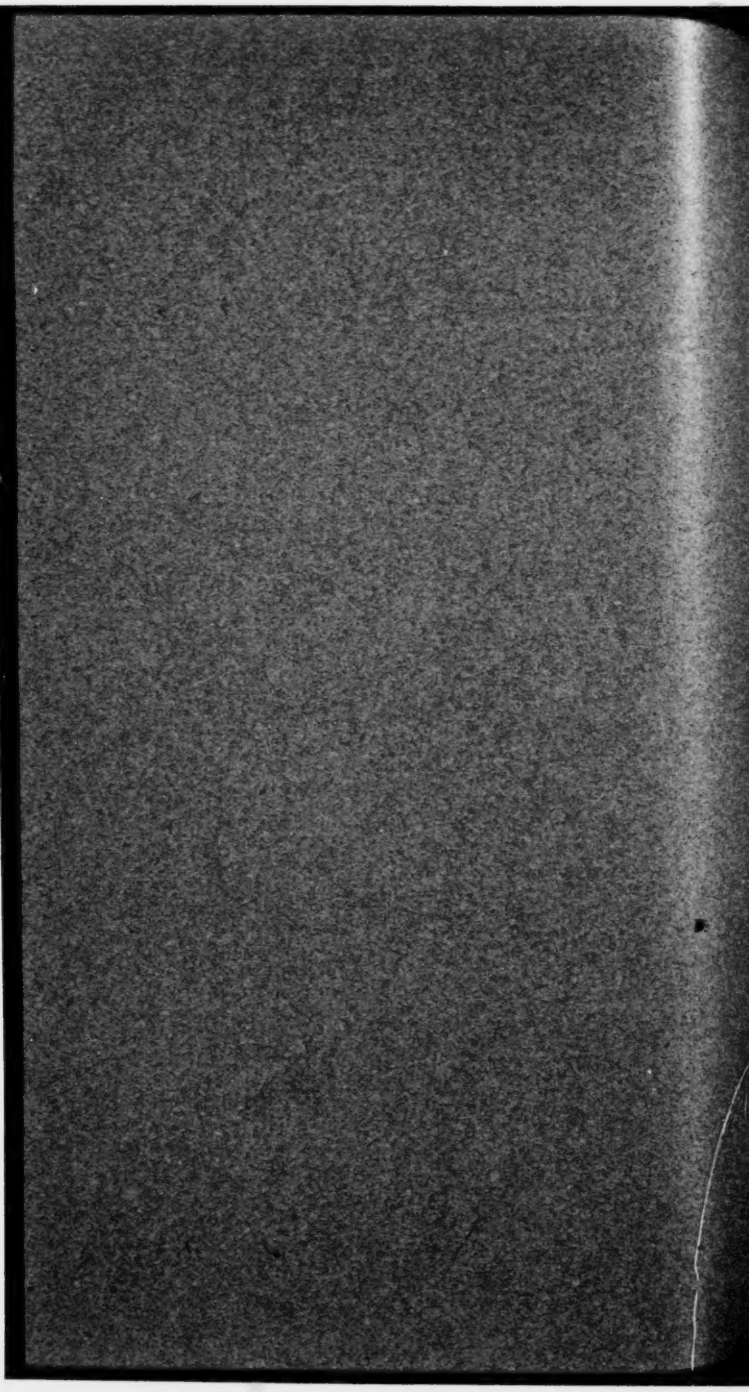
vs.

C. H. BOSWORTH, RECEIVER OF THE CHICAGO, PEORIA AND ST. LOUIS RAILWAY COMPANY, AND THE CHICAGO, PEORIA AND ST. LOUIS RAILWAY COMPANY.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

PETITION FOR CERTIORARI FILED APRIL 26, 1895.
CERTIORARI AND RETURN FILED MAY 28, 1895.

(16,857.)



(16,857.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1898.

No. 284.

THE HUNTTING ELEVATOR COMPANY, PETITIONER,

vs.

C. H. BOSWORTH, RECEIVER OF THE CHICAGO, PEORIA AND ST. LOUIS RAILWAY COMPANY, AND THE CHICAGO, PEORIA AND ST. LOUIS RAILWAY COMPANY.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

INDEX.

	Original.	Print.
Caption	*a*	1
Extracts from transcript from circuit court of the United States for southern district of Illinois	*b*	1
Intervening petition of the Huntting Elevator Co	23	1
Report of master	58	5
Exhibit—Report of master on petition of T. McMichael & Son	60	6
Exceptions of receiver to report of master	70	16
Order overruling exceptions and approving report	73	19
Decree, April 5, 1897	73	19
Petition of receiver for appeal	357	21
Assignment of errors by receiver	358	21
Bond for appeal by receiver	359	22

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., SEPTEMBER 15, 1898.

	Original.	Print.
Order allowing appeal of receiver	360	23
Petition of C., P. & St. L. R'y Co. to be made party and for leave to appeal	360	24
Assignment of errors by the C., P. & St. L. R'y Co.	362	25
Bond on appeal of the C., P. & St. L. R'y Co.	363	26
Order making C., P. & St. L. R'y Co. party defendant and allowing appeal, &c.	364	27
Decree, February 25, 1898	405	28
Writ of certiorari	411	28
Return to writ of certiorari	413	29
Stipulation as to return	414	30
Stipulation to omit parts of record in printing	416	31

a *Transcript of Record.*

In the United States Circuit Court of Appeals for the Seventh Circuit, October Term, A. D. 1896.

MERCANTILE TRUST COMPANY
vs.
CHICAGO, PEORIA & ST. LOUIS RAILWAY COMPANY ET AL. } No. 453.

In the matter of the intervening petition of the Huntting Elevator Company.

C. H. BOSWORTH, Receiver, etc., Appellant,
vs.
THE HUNTTING ELEVATOR COMPANY, Appellee.

Mr. Bluford Wilson, Mr. Philip B. Warren, counsel for appellant; Mr. George R. Peck, Mr. Burton Hanson, Mr. George P. Cary, counsel for appellee.

Transcript of record filed September 13, 1897.
Printed record filed Sep. 25, 1897.

OLIVER T. MORTON, *Clerk.*

b–22 In the Circuit Court of the United States for the Southern District of Illinois. In Chancery.

MERCANTILE TRUST COMPANY
vs.
CHICAGO, PEORIA & ST. LOUIS RAILWAY COMPANY *et al.* } Consolidated Cause.

In the matter of the intervening petition of the Huntting Elevator Company.

* * * * * * *

23 Afterwards, to wit, on the twenty-sixth day of January, in the year of our Lord one thousand eight hundred and ninety-five, came Huntting Elevator Co., by *his* solicitors, and filed in the clerk's office of said court its intervening petition, which is as follows, to wit:

Intervening Petition of the Huntting Elevator Co.

In the Circuit Court of the United States in and for the Southern District of Illinois.

THE MERCANTILE TRUST COMPANY OF NEW YORK, Complainant,
vs.
THE CHICAGO, PEORIA & ST. LOUIS RAILWAY COMPANY, Defendant.
} Consolidated Cause.

Intervening petition of the Huntting Elevator Co.

To the honorable the judges of said court:

Comes now your petitioner, The Huntting Elevator Company, a corporation duly organized and existing under and by virtue of the laws of the State of Iowa, having its principal office and place of business at McGregor, in said State of Iowa, and being a citizen of the said State of Iowa, intervening herein and by leave of court first had and obtained, files this its petition, and complaining
24 of the Chicago, Peoria & St. Louis Railway Company, a corporation duly organized and existing under and by virtue of the laws of the State of Illinois, and having its principal office and place of business at Springfield therein, states:

That on the 24th day of September, 1894, your petitioner at the city of Prairie du Chien, Wisconsin, delivered to the Chicago, Milwaukee & St. Paul Railway Company, two car-loads of barley in cars of that company numbered 11836 and 33090, which said two cars of barley were consigned to the Teichman Commission Company, St. Louis, Missouri, by way of East St. Louis; that said two car-loads of barley were transported by said Chicago, Milwaukee & St. Paul Railway Company to its station at Rock Island, the terminus of its line of railroad, and at that place the same was delivered to the Rock Island & Peoria Railroad Company, and by said last-named company transported to Peoria, in said State of Illinois, and there delivered to the Chicago, Peoria & St. Louis Railway Company, to be transported by it to destination; that said last-named company received said two car-loads of barley and transported the same as far as East St. Louis, a station on its line, and while the same were in transit and on their way to destination and in the possession and under the control of said last-named railway company, the said two cars containing said barley were destroyed by fire on the evening of the 28th of October, 1894; that said two car-loads of barley were of the value of eight hundred fifty-five and $\frac{17}{100}$ dollars ($855.17).

That on the 13th day of October, 1894, and on the 15th day of the same month and on the 18th day of the same month your petitioner at Lime Springs in the State of Iowa, delivered to the Chicago, Milwaukee and St. Paul Railway Company, a car-load of barley on each one of said days in cars of that company; to wit:

October 13, 1894, car numbered 34574; October 15, 1894, car numbered 32194, and on the 18th of October, 1894, car numbered 43080; that each one of said cars of barley was consigned to the Teichman Commission Company, St. Louis, Missouri, by way of East St. Louis; that each one of said cars of barley was transported by said Chicago, Milwaukee & St. Paul Railway Company to its station at Rock Island, the terminus of its line of railroad, and at that place each one of said cars were delivered to the Rock Island and Peoria Railroad Company, and by said last-named company transported to Peoria, in said State of Illinois, and there delivered to the Chicago, Peoria & St. Louis Railway Company, to be transported by it to destination; and that said last-named company received said three car-loads of barley and transported the same as far as East St. Louis, a station on its line, and while the same were in transit and on their way to destination, and in the possession of and under the control of said last-mentioned company, the said three cars containing said barley were destroyed by fire on the evening of the 28th day of October, 1894; that said three car-loads of barley were of the value of twelve hundred right dollars ($1,200).

That on the 12th day of October, 1894, your petitioner at Prairie du Chien, Wisconsin, delivered to the Chicago, Milwaukee & St. Paul Railway Company, one car-load of barley in a car of that company numbered 12, and on the 20th day of same October, your petitioner at said city of Prairie du Chien, delivered to said railway company, four other car-loads of barley in cars of that company numbered 178, 7286, 16802 and 46648, which said cars of barley so delivered to said railway company on said 12th and 20th days of October, were consigned to the Teichman Commission Company, St. Louis, Missouri, by way of East St. Louis; that said five car-loads of barley were transported by said Chicago, Milwaukee & St. Paul Railway Company to its station at Rock Island, the terminus of its line of railroad, and at that place the same were delivered to the Rock Island and Peoria Railroad Company, and by said last company transported to Peoria in said State of Illinois, and there delivered to the Chicago, Peoria and St. Louis Railway Company, to be transported by it to destination; that said last-named company received said five car-loads of barley and transported the same as far as East St. Louis, a station on its line, and while the same were in transit and on their way to destination and in the possession and under the control of the said last-named railway company, the said five cars containing said barley were destroyed by fire on the evening of the 28th day of October, 1894; that said five car-loads of barley were of the value of nineteen hundred seventy-one and $\frac{56}{100}$ dollars ($1,971.56).

Your petitioner further shows that some of the barley contained in the cars which were destroyed by fire was not totally burned; that while it was damaged by fire, yet it was not damaged to such an extent that all of it was entirely destroyed; that all of said barley that was not totally damaged and destroyed was cared for and put in condition to be disposed of upon the market and the amount realized on the barley not destroyed, but which was damaged, is

thirteen hundred ninety-two and $\frac{78}{100}$ dollars ($1,392.78), making the total loss to your petitioner, on account of the damage and destruction of its said barley as aforesaid, the sum of twenty-six hundred forty-one and $\frac{95}{100}$ dollars ($2,641.95).

Your petitioner further shows that all of said barley at the time it was damaged and destroyed by fire as aforesaid, belonged to your petitioner, and it was the sole owner thereof.

Your petitioner further shows that on the 21st day of September, 1893, in the suit of The Mercantile Trust Company of New
26–57 York, complainant, against The Chicago, Peoria & St. Louis Railway Company, in the circuit court of the United States, southern district of Illinois, Mr. C. H. Bosworth was, by an order duly entered therein, appointed the receiver of and placed in charge of the property, rights and franchises of said defendant railway company, and as such receiver has ever since the date of his appointment been engaged in managing and operating the railroad of said defendant railway company, in the transportation of persons and property over and upon the same, and that the liability of said railway company to your petitioner was incurred while its railroad was being operated by said receiver, and that the claim and demand of your petitioner herein is of a kind and accrued within a time which entitled it to a priority over rents and demands secured by mortgages, and to a payment by said receiver out of any funds which may come into his hands while operating the railroad of said defendant railroad company.

Wherefore your petitioner prays that said sum of twenty-six hundred forty-one and $\frac{95}{100}$ dollars ($2,641.95) may be allowed against the said receiver appointed as aforesaid; that said claim be declared a lien paramount to all other claims against the property of said Chicago, Peoria & St. Louis Railway Company, prior in right to the claims of mortgages, and a lien upon any money in the hands of said receiver, not otherwise appropriated; that the said receiver be ordered to pay the said amount out of any moneys that may come into his hands or out of the proceeds of the sale of the property of said railway company, before any distribution shall be made of the same, and for such other further orders and decrees as to the court shall seem meet and proper.

THE HUNTTING ELEVATOR COMPANY,
By J. H. ELLSWORTH, *Its President.*

BURTON HANSON,
GEORGE P. CARY,
Its Attorneys.

UNITED STATES OF AMERICA, }
Northern District of Iowa, } ss:

J. H. Ellsworth, being duly sworn, deposes and says that he is the president of The Huntting Elevator Company, the intervener herein; that he has read the foregoing petition and knows the contents thereof, and that the same is true.

J. H. ELLSWORTH.

Subscribed and sworn to before me this 10th day of January, A. D. 1895.

[SEAL.] WM. R. KINNAIRD,
Notary Public.

(Indorsed:) Filed January 26, 1895. James T. Jones, clerk.

* * * * * * *

58 Afterwards, to wit, on the 10th day of April in the year of our Lord one thousand eight hundred and ninety-six, came Stuart Brown, Esq., one of the masters of this court, and filed in the clerk's office of said court his report on said intervening petition, which report is as follows, to wit:

Report of Master in Chancery.

In the Circuit Court of the United States for the Southern District of Illinois.

MERCANTILE TRUST COMPANY *vs.* CHICAGO, PEORIA & ST. LOUIS. } Consolidated Cause.

Intervening petition of the Huntting Elevator Company.

Your subscriber, one of the masters in chancery of this honorable court, to whom the said intervention in the above-styled cause has been referred, would respectfully report that he has taken evidence, heard oral argument and had briefs presented upon the questions raised by the proof and herewith he offers his conclusions.

59 *The Pleadings*

Are the same in effect as were set out in the report of your subscriber on claim of T. McMichael & Son, filed April 8, 1896, and to which reference is hereby made.

The difference is shown in the amended stipulation, as to proof which in this intervention was as follows:

"That said petitioner, The Huntting Elevator Company, is a corporation as alleged, and that at the dates and times, and at the place in its petition mentioned, it delivered to the Chicago, Milwaukee & St. Paul Railway Company (10) ten car-loads of barley in cars, as stated in its petition, consigned to the Teichman Commission Company, St. Louis, Mo., via East St. Louis, Illinois. That written receipts, of which Exhibits B, C, D and E, attached to this stipulation are copies, were afterwards given by said railway company as testified to by the witnesses, S. Y. Hyde and E. J. Tull. That said barley was destroyed by fire at East St. Louis during the night of October 28, 1894; that said barley at the time it was so destroyed belonged to the petitioner and was of the value of two thousand, six hundred and $\frac{95}{100}$ dollars ($2,600.95). That the petitioner was damaged in that sum and is entitled to recover that amount

and interest, if it shall be adjudged that it is entitled to recover in this proceeding."

Evidence as to Ownership and Shipment.

It appears that the Huntting Elevator Company made sales of barley at certain places to Teichman Commission Company of St. Louis, these sales were made by sample, subject to inspection and weighing at St. Louis, Missouri. On September 24, intervenor shipped by C., M. & St. P. from Prairie du Chien, St. Paul cars Nos. 11836 and 33090; October 13th, from Lime Springs, Iowa, St. Paul car No. 34574; October 15th, from Lime Springs, St. Paul car No. 32194; October 18th, from Lime Springs, car No. 43080; October 12th, from Prairie du Chien, St. Paul car No. 12; October 20th, from same place, St. Paul cars Nos. 178, 7286 and 16802 and 46648, all consigned to Teichman Commission Company, St. Louis, Missouri, and freight paid to that place.

The cars were delivered to R. I. & P. Co., at Rock Island, and by them to C., P. & St. L., at Peoria, then transported to East St. Louis by the last-named railroad, and were destroyed by fire at that place on October 28, 1894.

It also appears that the barley destroyed was replaced by intervenors.

My conclusions are like those in intervention of T. McMichael & Son, and for reasons stated there (to which reference is made),
60 that the barley in question belonged to intervenors and that suit was properly brought by them.

I am also of the opinion that either the receiver of the Terminal railroad hold the barley as a common carrier, and that intervenor has a just claim against one of them.

The evidence as to delivery was the same as that in T. McMichael intervention, and my conclusions are the same for the reasons stated in that report.

I reach, therefore, the opinion that the intervenor has a just claim against the receiver in the sum of $3,600.95, and interest thereon at the rate of five per cent. per annum from date of loss to present date, and that it should be paid as the court may order.

All of which is respectfully reported this seventh day of April, 1896.

STUART BROWN, *M. C.*

(Indorsed:) Filed April 10, 1896. James T. Jones, clerk.

Exhibit to Report of Master.

T. McMichael & Son report.

In the Circuit Court of the United States for the Southern District of Illinois.

MERCANTILE TRUST COMPANY
vs.
CHICAGO, PEORIA AND ST. LOUIS. } Consolidated Cause.

Intervening petition of Thomas McMichael and William McMichael, doing business under the firm name of T. McMichael & Son.

Report of Master.

To the Hon. William J. Allen:

Your subscriber, one of the masters in chancery of this honorable court, to whom the said intervention in the above-styled cause has been referred, would respectfully report that he has taken evidence, heard oral argument and had briefs presented upon the questions presented by the proof, and herewith he offers his conclusions.

The Pleadings.

An intervention filed January 26, 1895, alleges among other things that on the 16th day of October, 1894, the petitioners delivered to the Chicago, Milwaukee & St. Paul Railway Company
61 four car-loads of barley in cars of said company, numbered 37506, 12336, 2598, 4126, and on the 19th day of the same month two other car-loads of barley in cars of said company, numbered 3728 and 18126; and on the 22d day of said month, two other car-loads of barley in cars of said company, numbered 10720 and 6842; also on the 6th of said month one car-load of barley in car of said company, numbered 26088, and on the 22d of said month, two other car-loads of barley in cars of said company, numbered 4268 and 7552; that all of said car-loads were consigned to Teichman Commission Company, St. Louis, Mo., via East St. Louis, Ills.; that all were transported by said C., M. & St. P. Company to Rock Island, Ill., and there delivered to the Rock Island & Peoria Railway Company, and by said last-named company transported to Peoria, Illinois, and delivered to the Chicago, Peoria & St. Louis Railway Company, and were by it transported as far as East St. Louis, and while still in transit and on their way to destination, and in the possession and under the control of said C., P. & St. L. R'y Co. the first-mentioned eight cars of barley and their contents were destroyed by fire on the evening of the 28th day of October, 1894, and damage resulted to petitioners of $2,942.56; that the last-named three cars and the barley contained therein was partially destroyed by said fire, and after its disposal damaged petitioners $226.68, making a

total loss or damage to said petitioners of $3,169.24; petitioners further allege that said barley belonged to them at the time it was so damaged, and that they were the sole owners thereof; petitioners ask for relief and that receiver pay said amount of $3,169.24 as a just claim prior to rights of mortgage bondholders.

On the 11th day of March, 1895, C. H. Bosworth, receiver, filed his answer, alleging that after delivery to the C., P. & St. L., and before the filing of the intervention, the said cars and their contents were delivered, in the due course of business, to the Terminal Railroad Association of St. Louis, and while in their possession said cars were destroyed; and further that they were destroyed by a fire negligently caused by and originated in a spark coming from a certain engine belonging to and being operated by and in the service of the Terminal R. R. Association; and, further, while in the care and custody of said Terminal Association, under a contract whereby the Terminal railroad agreed to give the said receiver terminal facilities, handle trains, care for engines and freight, under a regular interchange of business and according to custom, exercising due care and caution, but said Terminal Association willfully and negligently stored said property in close proximity to a certain load of hay, which was fired by sparks from a certain passing switch-engine of said Terminal Association; and further said Terminal As-
62 sociation caused said fire, by storing said inflammable hay in a veritable fire-trap; receiver denies responsibility, and asks to have Terminal R. R. made a party defendant.

On May 13, 1895, Bosworth, receiver, files a cross-petition, stating that all property mentioned in interventions was in care and custody of Terminal Association under a contract by which said Terminal R. R. was to give receiver terminal facilities, etc., and it was the duty of said association to exercise due care and caution in safe-keeping and handling said cars, but it willfully and negligently stored them in a dangerous place; that said cars were delivered to Terminal Association by receiver in due course of business, and while in the possession and under the care of said association were destroyed; and, although they allowed said cars mentioned in said interventions to be destroyed, they did save all of their said cars; asks for a rule to show cause why it should not be made a party defendant June 1, 1895; rule entered, directed against Terminal R. R. Association, requiring it to show cause on or before June 15, 1895, why it should not be made a party defendant, etc.

June 15, 1895, Terminal R. R. Association by its solicitor, moves court to discharge rule of June 1st, for lack of jurisdiction and other reasons stated. No further action was taken on said rule and said Terminal R. R. Association was not made a party defendant.

August 27, 1895, a stipulation was entered into in this intervention (with others) by counsel for purposes of saving labor and expense of making proof, which said stipulation was afterwards, on January 23, 1896, amended by an order of court, and which stipulation was, in its amended form, as follows:

"That the petitioners, Thomas McMichael and William McMichael are partners engaged in business at McGregor, Iowa, under the firm

name of T. McMichael & Son, as alleged, and that at the dates and times and at the place in their petition mentioned, they delivered to them Chicago, Milwaukee & St. Paul Railway Company eight (8) car-loads of barley, in cars, as stated in their petition, consigned to the Teichman Commission Company, St. Louis, Missouri, by way of East St. Louis, Illinois. That written receipts, of which Exhibits B, C, D and E attached to this stipulation are copies, were afterwards given by said railway company, as testified to by witnesses S. Y. Hyde and E. J. Tull. That said barley was destroyed by fire at said East St. Louis during the night of October 28, 1894; that said barley, at the time it was destroyed, belonged to the petitioners, and was of the value of twenty-nine hundred and forty-two dollars and $\frac{56}{100}$ ($2,942.56); that the petitioners were damaged in that sum, and are entitled to recover that amount, with interest, if it shall be adjudged that they are entitled to recover in this proceeding."

63 (This omits three cars partially destroyed as above stated.)

September 4, 1895, replication, general, to answer of defendants, filed as of March 15, 1895.

October 24, 1895, amendment to petition filed. Alleges for further ground of recovery that upon the arrival of the cars mentioned and described in said petitions at said East St. Louis, and while the same were still in the possession of said receiver, said receiver negligently caused and permitted them, together with their contents to be placed near a wooden warehouse open at sides and ends and filled with combustibles, etc.

November 18, 1895, amended answer of receiver filed. Denies cars were placed by defendant, while same were still in possession of defendant, negligently near warehouse; further expressly denies knowledge of character of said wooden warehouse, affirms they were delivered to and in the custody of Terminal Association under contract, etc.; had no control over care, etc., affirms that intervening petitioners had knowledge, through their assignees, of condition of affairs; further that the cars and contents remained in close proximity to wooden warehouse with full knowledge, approval and consent of the said intervening petitioners, through their agents, the consignees, and thus remained for the convenience of said assignees, and at their risk.

The Evidence as to Ownership and Shipment.

From the evidence it appears that the firm of T. McMichael & Son sold to Teichman & Company by sample, 15,000 bushels of barley in October, 1894, at 58 cents net per bushel in St. Louis, Missouri. The eleven cars specified by number in the petition were shipped from McGregor, Iowa, at the time named, over the C., M. & St. P. railway, and freight to St. Louis was paid by shippers. The cars were delivered to Rock Island & Peoria R. R. and by these to C. P. & St. L. at Peoria, Illinois.

From the evidence it would appear that the custom was to send a sample of barley by express to commission-house at St. Louis,

which made a bid upon it. If the bid was accepted the grain was delivered to the C. M. & St. P. for delivery at St. Louis, via East St. Louis, subject to inspection and weighing.

These cars were transported to East St. Louis by the last-named railroad on November 2, 1894; W. R. Bradley, car accountant of the C. P. & St. L., reported the first eight car numbers burned by fire at East St. Louis, October 28, and last three car numbers as damaged by fire at East St. Louis, October 28th.

On October 30th the consignee Teichman Commission Company wrote to shipper "We are convinced that several of *your cars* were in the lot of burned and damaged barley. We would now 64 suggest that you give notice to your railroad at your end, to push the Jacksonville Southeastern line here, to adjust loss sustained, as speedily as possible."

On November 2d, the consignee telegraphs "Will you replace the burnt barley at once to fill sale."

To which shipper answered:

"Yes, will load tomorrow."

On November 2d, consignee writes as follows:

"We are in receipt of your telegram saying you will replace your barley lost by the late fire; we now have the assurance of the receiver of the J. & S. E. R. R., that they are amply able and anxious to settle the loss of barley by fire, as speedily as possible, which, however, may be delayed by the question arising if the barley is covered by their insurance policy or by the one held by the Terminal Railway Company, which will soon be determined, as that company is co-operating with the J. S. & E. R. R., to effect an adjustment."

On November 3rd, the shipper writes consignee:

"We have made bill for cars X X X and sent same to C., M. & St. P. R. R., and presume they will pay us as soon as they look it up."

Conclusions as to Ownership.

Notwithstanding the stipulation of August 27, 1895, quoted above, the claim is now made that petitioners are not the owners of this barley, but have parted with their title to consignee. Taken in its barest legal sense, delivery is made by a vendor when he gives up his goods to a common carrier for transportation. Even law courts, however, do not hold this rule without exception, but where there is anything to be done as of weighing or measuring, they hold the performance of these things a condition precedent. These were goods sold by sample and the vendee had the right to refuse to accept them if not up to grade. But further, it is very apparent from the acts of the parties that they intended the barley to be delivered at St. Louis. The shipper's willingness to assume the responsibility of an action against the carriers is not, of course, conclusive, but the intention of the parties is clearly displayed by the correspondence after the loss of the consignment where both shipper and consignee immediately act upon the understanding that it was the shipper's loss and that the carrier was the shipper's

agent. The object in a court of equity is moreover to discover the true owner of these goods and not the technical owner, and where the parties in interest agree as to ownership of goods, the carrier is amply protected in any payment he may make.

My conclusion is that intervenors have properly brought suit.

65 *Custom as to Barley.*

It is contended by counsel for defendant that the liability of the receiver cannot be greater than that of warehousemen. This contention is not raised in the answer to the original petition, but may be considered as raised by the answer to the amended petitions. It is, of course, entirely inconsistent with the defense that the car had been delivered to the Terminal Railroad Association, for if they held them as warehousemen, then they had not delivered them. Still, however, admitting the question is subject to discussion, the burden of proof is in such case most certainly cast upon the carrier; its liability as an insurer continued until the cars had reached their destination and been unloaded or placed in a safe warehouse, or place for unloading.

Porter v. Chicago & R. I. R. R., 20 Ill., 407.
C. & N. W. R. R. Co. v. Bensley, 69 Ill., 630.

The destination of the cars was St. Louis, Missouri (see stipulation),

Wabash R. R. v. Jaggerman, 115 Ill., 407,

and it is very uncertain whether consignee, under the circumstances, even if notice to him had been given, could prejudice the rights of the owner by any change of destination. I am of the opinion that either the receiver or the Terminal railroad held the barley as a common carrier. Having reached that conclusion, it is unnecessary to discuss the degree of care exercised.

Do the limitations in the bills of lading or shipping receipts enure to the benefit of connecting carrier?

Certainly not in this case. In the case cited by counsel for defendant, *R. R. Co. v. Mfg. Co.*, 16 Wallace, 318, and which was delivered in a State where no laws had been passed as to limitations of liability the court says: "It is not only against the policy of the law, but a serious injury to commerce to allow the carrier to say that the shipper of merchandise assents to the term proposed in a notice whether it be general to the public or special to a particular person, merely because he does not expressly dissent from them." But by the laws of Iowa, the shipping point, and by the laws of Illinois, the place of loss, common carriers are prohibited from limiting their common-law liability in any receipt.

Further, it developed from the evidence that the bills of lading as shown, were given subsequent to the destruction of property and simply as evidence of shipment.

"After the goods are shipped, it is too late to impose upon the

shipper a cause exempting the carrier from liability from loss by fire, after such fire has occurred."

Lamb v. Camden & A. R. Co., 4 Daly, 483.

66 I am therefore forced to the conclusion that the owners of this barley have a just claim for its value from one of the common carriers who have transported it, or agreed to transport it.

The evidence is conclusive that the barley was safely carried by C. M. & St. P. to Rock Island and from there carried by the Rock Island & Peoria, to Peoria, Illinois; where it was delivered to the C. P. & St. L. and by it transported to East St. Louis.

The sole question then remains was it delivered by the C. P. & St. L. to the Terminal Railroad Association, for further carriage.

What is the evidence as to

Delivery.

The barley in question was carried by the C. P. & St. L. to the end of its track proper. There is no connection between that point and the Eads bridge or Wiggins Ferry leading to St. Louis, Missouri. The old C. P. & St. L. R. R. having no terminal facilities in East St. Louis for the forwarding of freight prior to the receivership, made an agreement with the Terminal Railroad Association of St. Louis, to furnish the needed facilities. This agreement was made June 1, 1891, and -as never formally re-enacted by the receiver, but his testimony shows that he ratified its and was and is now doing business under it. It provided for the handling of C. P. & St. L. trains, cars of its engines and cars, and the handling and care of freight at the rate of fifty cents for each loaded car and regular freight charges. By it, the Terminal railroad agreed to furnish the necessary yard room, or track facilities, switch-engines, and yardmen in making up and breaking up all freight trains, &c. The course of business under this agreement was for the C. P. & St. L. to carry its freight to the end of its own tracks proper, and then upon certain Y tracks which belonged to the Terminal railroad; here the engine of the C. P. & St. L. to carry its was cut off, and the Terminal engines broke up and the train deposited its cars upon certain tracks in the Terminal yards. These tracks of deposit were not exclusively used by the C. P. & St. L., but the cars seem to have been always placed upon them. A wooden warehouse through which these tracks ran or was near to was not used at the time of the fire by the C. P. & St. L. railway, but was used by a commission company for the storage of bailed hay. This warehouse was, as the evidence shows, a dangerous fire-trap.

From the statement of Calvert, the agent of the C. P. & St. L. at East St. Louis, it appears that the cars containing this barley came to the Y tracks on the following dates:

4126 on October 25, 1894.	10720 on October 26, 1894.
2598 on October 25, 1894.	6842 on October 26, 1894.
12336 on October 26, 1894.	4268 on October 26, 1894.
3728 on October 26, 1894.	7552 on October 26, 1894.
18126 on October 26, 1894.	37506 on October 26, 1894.

67 Two arrived there on the third day before the fire, nine on the second day, and one on the night before.

On the night of Sunday, October 28th, the fire broke out in the wooden warehouse about 11 p. m., and consumed it, together with the cars in controversy, and many others. The origin of the fire does not appear from the evidence, but it is supposed to have resulted from sparks of a passing engine communicated to the hay in the warehouse and fanned by a high wind. Evidence admitted under objection showed that the Terminal railroad attempted to save its own cars first, and would not allow agents of the C. P. & St. L. to direct the movement of engines. The evidence as to course of business further showed that when cars were set on these deposit tracks, they remained there until a waybill was prepared by the agents of the C. P. & St. L., directing their transfer or forwarding to some other point. When this waybill was presented to the Terminal railroad, its engines again took hold of the cars designated, and placed them wherever the waybill ordered. When this waybill was presented to the Terminal railroad, then, and not until then, the car accountant of the C. P. & St. L. made out a junction report. Junction reports in was shown were a general custom of railroads, and were simply a postal card sent to and informing the railroad, which had originated a car of freight, that a car, designated by a certain number, had been delivered to a connecting carrier by the railroad sending the card. Their purpose, of course, being to keep track of cars.

The evidence in this case shows that no waybill for these cars was given to the Terminal R. R., nor was any junction report sent to the C. M. & St. P.

The evidence further shows that no notice was sent to the owner, shipper or consignee of the arrival of said cars at St. Louis, or of the delivery of them to the Terminal railroad.

The evidence also shows that Calvert, the local agent of the C. P. & St. L. made a claim against the insurance company for the value of these cars and contents stating that the fire occurred on October 28, 1894, and consumed this freight in transit. Also, that salvage operations were carried on by the C. P. & St. L., and the result paid to the shipper. Also, that the cars damaged and not entirely destroyed by said fire, were repaired at the cost of the C. P. & St. L. railroad and returned to their owners. The evidence, however, also shows that the receiver ordered insurance claims to be filed because of the time limit imposed by the insurance policies, and that he made salvage and repaired cars after demand upon the Terminal R. R. to do same, and with the understanding that his action should not prejudice any claim he might have against the said Terminal Association.

Whatever bearing these admissions may have with relation to the shippers I have not considered.

68 *Conclusions.*

It may be assumed that the rule in America is that the obligation of a common carrier of goods is to carry them over its own line

and safely deliver to the connecting carrier, and, if there is a necessity for storage, it is considered a mere accessory to transportation.

R. R. v. Mfg. Co., 16 Wallace, 318.

The burden of proof is upon the carrier to show that at the time of loss, without negligence on his part, his liability as insurer had terminated.

P. & P. N. v. C., R. I. & P., 109 Ill., 135.
R. R. v. Mfg. Co., 16 Wall., 318.
Schulter v. Adams Exp. Co., 5 Mo., 316.

The question to be determined is whether anything remains to be done by the carrier in completion of its contract to safely carry and deliver.

Gregg v. Ill. Cent., 147, 556.

"It is very clear that the simple deposit of the goods by the carrier in his depot, unaccompanied by any act indicating the intention to renounce the obligation of a carrier, will not change or modify even his liability."

R. R. v. Mfg. Co., 16 Wall., 318.

Notice must be given consignee.

Carrier who receives goods for further transportation continues liable as carrier until they are received by another carrier, or until he in some way distinctly renounces responsibility.

Conkey v. M. & St. P. R. R. Co., 31 Wis., 619.

Judging this case by the above rules, did anything remain to be done by the C., P. & St. L.?

Was the intention to renounce its obligation indicated by any act?

Was notice given to consignee? Did C., P. & St. L. distinctly renounce its responsibility?

Were the goods left in the sole control of the Terminal railroad?

Under the evidence these questions must be answered adversely to the receiver.

The tracks set apart for the use of the receiver were, as far as this controversy goes, his own. They were his by the agreement of leasing. They were not a destination point. It was not intended nor was it feasible to unload there. After the cars reached that point, they could not be controlled nor taken away by the Terminal railroad, which was simply one of the instruments used by receiver in his carriage of freight. It was only by the further act of the receiver or his agents that the cars could be moved at all. It
69 was not in the power of the Terminal railroad under the lease to change his order of things, whereas, the receiver might at any moment have terminated his responsibility by issuing a waybill, directing the further carriage of the cars to their proper destination.

The supreme court of Illinois have, it is true, in Smyser case, 38th Illinois, said that the mere signing of a bill of lading alone

does not transfer freight, but that is evidence of transfer; they were speaking of the original shipment, and of the initial carrier. In such a case, the acceptance of freight of course controls. So in the case at bar—no bill of lading was issued by the C., M. & St. P., but they accepted the freight and became a carrier by their own act. The terminal railroad did not however accept this freight at East St. Louis. They had no opportunity to do so.

So in *Pratt v. Grand Trunk*, 5 Otto, 43.

Where there was a joint possession and a definite place for deposit of goods destined for transportation, the court properly says, that the goods were under the control of the agents of the R. R. Co.; that they were deposited and received for transportation; that no further orders were expected.

So also, in *Merriam v. Hartford R'y Co.*, 24 Conn., 354, it was held that if a common carrier agree that property may be deposited in a certain place without notice to him, such deposit alone is sufficient delivery, and such agreement may be shown by a constant practice and usage.

But in the case at bar, the facts were the direct converse of these above-recited cases. The usage and custom was shown to require a waybill or special notice.

This case likens itself to the case of *Mt. Vernon Car Co. v. Alabama G. S. R. Co.*, 92 Ala., 296.

I quote from Ray on Freight Carriers:

"The placing of a car by an initial carrier on the side track of the connecting carrier, without giving the latter any notice, and without marking it with the name and address of the consignee, or sending any waybill or shipping directions does not establish the relation of contractors between the initial and the connecting carrier."

The reason of such a rule is apparent on a moment's reflection.

What order or system could be maintained if the hundreds of cars that pour into such a terminal point were without direction? It is also significant in this connection that the junction reports, that the evidence shows were made when a transfer took place, were not made for these cars.

I reach the opinion that the intervenors have a just claim against the receivers in the sum of $3,169.24, and interest at 5% from loss, and that it should be paid as the court may order.

All of which is respectfully reported this 7th day of April, 1896.

STUART BROWN, *M. C.*

70 And afterwards, to wit: on the 27th day of April, in the year last aforesaid, came again the receiver, and filed in the clerk's office of said court, his exceptions to the report of the master, which exceptions are in the words and figures following, to wit:

Exceptions of Receiver.

In the Circuit Court of the United States for Southern District of Illinois.

MERCANTILE TRUST COMPANY
vs.
CHICAGO, PEORIA & ST. LOUIS RAILWAY Company. } Consolidated Cause.

In the matter of the intervening petition of the Huntting Elevator Company.

Exceptions of the Receiver to the Master's Report.

Now come- C. H. Bosworth, receiver herein, and excepts to the report of Stuart Brown, master in chancery, filed in the above-entitled matter, on the 10th day of April, 1896, and for cause of exception, shows:

First. For that the said master has reported that the stipulation entered into between the parties on August 27th, 1895, was so amended as to include, among other things, the following clause: "That said barley, at the time it was destroyed, belonged to the petitioner;" whereas the said master should have reported, by order of the court, entered on the 23d day of January, 1896, *the* the said *of* clause above quoted, was stricken from said stipulation.

Second. For that the said master by reference to his repo*tr* filed on the intervening petition of T. McMichael & Son, in above-entitled consolidated cause, on the 8th day of April, 1896, reported his conclusion to be that the intervenor has properly brought suit; whereas, the said master should have reported that the title to the property involved had entirely passed from intervenor, and that at the time said loss occurred, intervenor was not the owner thereof, nor had any right, title or interest therein.

Third. For that the said master has, by reference to his report on the intervening petition of T. McMichael & Son, above referred to, reported that the destination of the cars was St. Louis, Missouri; whereas, the said master should have reported that the destination of said cars, and their contents, was East St. Louis, Illinois.

Fourth. For that the said master has, by reference to his report on the intervening petition of T. McMichael & Son, above referred to, reported that either the receiver or the Terminal railroad held the barley as a common carrier; whereas, the said master should have reported that the barley in question, at the time that it
71 was damaged and destroyed, was in the custody and under the control and management of the Terminal Railroad Association of St. Louis, as a warehous-man.

Fifth. For that the said master has, by reference to his report, on the intervening petition of T. McMichael & Son, above referred to, reported that the limitations in the bills of lading or shipping

receipts, do not enure to the benefit of connecting carriers; whereas, said master should have reported that bills of lading or shipping receipts, under and by virtue of which, said barley was transported, constitute specific contracts, containing a clause exempting the carrier from liability for loss by fire, and that the benefit of said contract enured to each of the connecting carriers, including the receiver.

Sixth. For that the said master has failed and refused to report that the barley in question, at the time of its damage and destruction, had been delivered by the receiver to the Terminal Railroad Association of St. Louis in the due course of business, and was then in the custody of and under the control and management of said Terminal Railroad Association of St. Louis.

Seventh. For that the said master has reported that the intervenors have a just claim against the receiver in the sum of $2,600.95 and interest thereon at the rate of 5 % per annum, from date of loss to April 7, 1896, and that it should be paid as the court may direct; whereas, the said master should have reported that said intervenor was not entitled to recover from the receiver for the loss and damage occurring to the said barley by reason of said fire, and that said petition should be dismissed at petitioner's cost.

Eighth. For that the said master has failed and refused to report that it appears from the evidence that the consignee of said intervenor had entered into a contract with the said Terminal Railroad Association of St. Louis, by virtue of which the latter was holding said barley, at the time of its loss and destruction, as a warehouseman, awaiting further orders as to reshipment from said consignee, and for the convenience of said consignee, as the agent of said intervenor.

Ninth. For that the said master has failed and refused to report that it appears from the evidence that the consignee of said intervenor was acting as its agent, and that said intervenor had full knowledge of the manner in which said barley was being handled in St. Louis, through its agent, the said consignee, and acquiesced therein.

Tenth. For that the said master has failed and refused to report that it appears from the evidence that it was the custom of the consignees of said intervenor to have all grain which intervenor shipped to said consignee held in the yards of the Terminal railroad at East St. Louis, to await further orders as to reshipment; and that
72 said further orders were dependent upon the state of the market and the sales made by said consignee, and for the convenience of intervenor.

Eleventh. For that the said master has failed and refused to report that the obligation of the receiver, as a common carrier, was to transport said barley to East St. Louis only, and there put it on the tracks of the Terminal Railroad Association of St. Louis, in the usual place of deposit, where, the evidence shows, it was the custom, acquiesced in by the intervenors, through its agent the consignee, to have the same remain until said consignee should desire to reship it, whereupon, according to said custom, a separate contract of car-

riage would be entered into with, and a new bill of lading issued to, said consignee.

Twelfth. For that the said master has, by reference to his report on the intervening petition of T. McMichael & Son, above referred to, found and reported that the said receiver was liable to the intervenor, as a common carrier; whereas, the said master should have found from the evidence, that the said receiver, as a common carrier, had in all respects complied with his contract of carriage, by safely transporting and delivering the said grain to East St. Louis, and there depositing it in the customary and usual place for delivery, on tracks designated for that purpose, in the yards of the Terminal Railroad Association of St. Louis, and for that reason is fully discharged from all liability in respect to the loss of said grain by fire.

Thirteenth. For that the said master has found by reference to said report on petition of T. McMichael & Son, that said receiver, as a common carrier, was liable on account of the loss by fire of said grain; whereas, he should have found and reported that the said fire occurred after the said receiver had faithfully delivered the said goods at their point of destination, under the contract with said receiver, and that the said goods were thereafter lost by fire, through the negligence of said Terminal Railroad Association of St. Louis, and not through any default or negligence of said receiver.

And thereupon this receiver prays that the said master's report be annulled and set aside, and that a decree may be entered on said intervening petition, dismissing the same at petitioner's cost.

C. H. BOSWORTH, *Receiver*,
By BLUFORD WILSON AND
P. B. WARREN,
His Solicitors.

(Indorsed:) Filed April 27, 1896. James T. Jones, clerk.

Afterwards, to wit: on the 3d day of March, in the January term of said court, in the year of our Lord one thousand eight hundred and ninety-seven, the following further proceedings were had in said cause and entered of record, to wit:

73 *Order, March* 3, 1897.

United States Circuit Court, Southern District of Illinois, January Term, 1897.

MERCANTILE TRUST COMPANY
vs.
CHICAGO, PEORIA & ST. LOUIS R. R. CO.

Interventions of—
Chicago, Milwaukee & St. Paul Railway Company;
W. W. Cargill Company;
T. McMichael & Son;
S. Y. Hyde Elevator Company;
Huntting Elevator Company;
Jacob Rau;
Gilchrist & Company;
Henry Rippe;
Carr, Ryder & Engler Company.

It is ordered by the court that the exceptions filed in the foregoing interventions, respectively, by the defendant, receiver of the Chicago, Peoria & St. Louis Railroad Company, to the reports of the master, be and the same are severally overruled and the reports respectively approved.

Afterwards, to wit: on the 5th day of April, in the term and year last aforesaid, the following further proceedings were had in said court in said cause, and entered of record, to wit:

Decree, April 5, 1897.

In the Circuit Court of the United States for the Southern District of Illinois.

THE MERCANTILE TRUST COMPANY OF NEW York, Complainant,
vs.
CHICAGO, PEORIA & ST. LOUIS RAILWAY COMPANY *et al.*, Defendants.
} In Equity. Consolidated Cause.

In the matter of the intervening petition of the Huntting Elevator Company.

And now on the 5th day of April, A. D. 1897, came again the said intervenor, The Huntting Elevator Company, by Burton Hanson and George P. Cary, its counsel, and the said Mercantile Trust Company of New York by Bluford Wilson, its counsel, and also C. H. Bosworth, receiver herein, by Bluford Wilson and P. B. Warren, his counsel, and this cause coming on to be further heard upon the exception of the said C. H. Bosworth, receiver, to the report of the

master in chancery herein, and the court having heard argument of counsel, and being sufficiently advised, doth order and adjudge and decree that said exceptions be, and they are hereby overruled, and the report of said master is in all things confirmed.

74–356 It is further ordered, adjudged and decreed by the court that said C. H. Bosworth, receiver, pay as a part of the expenses of his receivership, within ninety days from the entry of this decree, the said sum found to be due to said intervenor, The Huntting Elevator Company, to wit: the sum of two thousand six hundred dollars and ninety-five cents ($2,600.95), with interest thereon at the rate of five per cent. (5%) per annum from the 10th day of April, 1896, the date of the filing of the master's report, to the entry of this decree, making a total of principal and interest the sum of twenty-seven hundred and thirty dollars and ninety-five cents, and costs, exclusive of clerk's fee, amounting to sixteen dollars and — cents, making a total of principal, interest and costs of twenty-seven hundred and forty-six dollars and ninety-five cents ($2,746.95).

It is further ordered, adjudged and decreed that inasmuch as the aforesaid amount is properly chargeable to the expenses of the receivership of C. H. Bosworth herein, this decree for the payment of said amount to said intervenor, The Huntting Elevator Company, be and the same is hereby adjudged to be a lien upon all the property and income of said defendant, Chicago, Peoria & St. Louis Company, as it existed and was known during said receivership, in favor of the intervenor, The Huntting Elevator Company, and upon all of the property and income of the purchaser or purchasers, purchased at the foreclosure sale heretofore had, their successors or assigns.

It is further ordered, adjudged and decreed that said lien be and the same is hereby adjudged to be a lien upon all the property and income of said defendant, Chicago, Peoria & St. Louis Railway Company, its said purchaser or purchasers, their successors or assigns, prior and superior to the lien of the mortgage given by said defendant railway company to the Mercantile Trust Company of New York, and to any and all mortgages that may have been placed upon said property by said defendant, or said purchaser or purchasers, their successors or assigns, or which may hereafter be placed upon said property.

And the court having in the original decree and confirmation of sale thereunder specially reserved the right of caption of the property of said Chicago, Peoria & St. Louis Railway Company to enforce the payment of the sum or sums that might be decreed to be liens on said property, it is further ordered, adjudged and decreed that if said amount herein adjudged and decreed to be paid to said intervenor, The Huntting Elevator Company, is not paid within the time herein limited, the said C. H. Bosworth, as receiver, is hereby directed to take possession of all of said railroad property, together with its income, rolling stock and real estate, and operate the same, and out of the net earnings pay the amount due on this decree to the Huntting Elevator Company.

* * * * * * *

357 *Petition of Receiver for Appeal, April 5, 1897.*

In the Circuit Court of the United States for Southern District of Illinois.

MERCANTILE TRUST COMPANY
vs.
CHICAGO, PEORIA & ST. LOUIS RAILWAY COMPANY. } Consolidated Cause.

In the matter of the intervening petition of Huntting Elevator Company.

Petition for Appeal.

The petition of C. H. Bosworth, receiver herein, showeth unto your honor that a final decree was entered in the above-entitled cause on the 5th day of April, 1897, whereby it was ordered, adjudged and decreed that your petitioner should pay to the said Huntting Elevator Company the sum of $2,600.95 your petitioner further states to your honor that he has assigned errors upon the record in said cause, specifying errors, as he alleges, in the record and decree aforesaid. He therefore prays that your honor will grant an appeal from the said judgment and decree to your petitioner, upon condition that he enters into bond in the sum of five hundred dollars, with surety to be approved by this honorable court, in such time as your honor shall order and decree.

C. H. BOSWORTH, *Receiver,*
By BLUFORD WILSON,
PHILIP BARTON WARREN,
His Solicitors.

(Indorsed): Filed April 5, 1897. James T. Jones, clerk.

358 *Assignment of Errors by Receiver.*

In the Circuit Court of the United States for Southern District of Illinois.

MERCANTILE TRUST COMPANY
vs.
CHICAGO, PEORIA & ST. LOUIS RAILWAY COMPANY. } Consolidated Cause.

In the matter of the intervening petition of Huntting Elevator Company.

Assignment of Errors.

And now comes C. H. Bosworth, receiver herein, by Bluford Wilson and P. B. Warren, his solicitors, and says there is manifest error in the record and proceedings in the above-entitled judgment and decree; and specifies the following, to wit:

1. The court erred in overruling the exceptions filed by the receiver to the report of the master.

2. The court erred in failing and refusing to sustain the exceptions filed by the receiver to the report of the master.

3. The court erred in ordering and adjudging that the petitioner was entitled to a valid and first lien on the property of the defendant railway company ahead of the mortgage indebtedness, and upon all of the property and income of the purchasers, purchased at the foreclosure sale of said railway property.

4. The court erred in failing and refusing to order, adjudge and decree that the claim of the intervenor was not entitled to a valid and first lien on the property of the defendant railway company, ahead of the mortgage indebtedness, and upon all of the property and income of the purchasers, purchased at the foreclosure sale of said railway property.

4. The court erred in ordering, adjudging and decreeing that said receiver pay to the intervening petitioner the sum of $1,444.07 with interest thereon from the date of the filing of the master's report, together with the costs in this case.

6. The court erred in ordering, adjudging and decreeing that if said amount was not paid by the receiver within the time there limited, the said receiver be directed to take possession of all of said property and operate the same, and out of the net earnings, pay said amount.

Whereby, the plaintiff in error prays that said judgment and decree be reversed and annulled, with directions to the lower court to dismiss said intervening petition.

BLUFORD WILSON,
PHILIP BARTON WARREN,
Solicitors for C. H. Bosworth, Receiver.

(Indorsed:) Filed April 5, 1897. James T. Jones, clerk.

359 *Bond for Appeal by C. H. Bosworth, Receiver.*

In the Circuit Court of the United States for Southern District of Illinois.

Mercantile Trust Company vs. Chicago, Peoria & St. Louis Railway Company.	Consolidated Cause.

In the matter of the intervening petition of Huntting Elevator Company.

Bond.

Know all men by these presents, that we, C. H. Bosworth, as receiver of the Chicago, Peoria & St. Louis Railway Company as principal, and Bluford Wilson as surety, are held and firmly bound unto the Huntting Elevator Company in the penal sum of five

hundred dollars, for the payment of which, well and truly to be made, the said receiver, as such, binds himself and his successor, and the said surety binds himself, his heirs and personal representatives, jointly and severally, by these presents.

Dated this 31st day of May, 1897.

The condition of this obligation is such that whereas, on the 5th day of April, 1897, in the circuit court of the United States, for the southern district of Illinois, in the above-entitled cause, it was ordered, adjudged and decreed by the court that the above-bounden C. H. Bosworth, as receiver, should pay over to the said Huntting Elevator Company the sum of $2,600.95 and from which decree the said receiver has appealed to the United States circuit court of appeals for the seventh circuit, and upon the condition that the receiver should enter into bond in the sum of five hundred dollars with surety to be approved by the court:

Now, therefore, if the said receiver shall well and truly, without delay, prosecute the said appeal with effect, and shall pay all costs and damages that may be adjudged against him, by reason of said appeal, and all costs that may accrue therein in case of dismissal of said appeal by appellant, then this obligation to be null and void, otherwise to remain in full force and effect.

C. H. BOSWORTH,
As Receiver of the Chicago, Peoria & St. Louis Railway Company. [SEAL.]
BLUFORD WILSON. [SEAL.]

Approved:
WILLIAM J. ALLEN,
United States District Judge.

360 *Order Allowing C. H. Bosworth, Receiver, an Appeal and Approving Bond.*

In the Circuit Court of the United States for Southern District of Illinois.

MERCANTILE TRUST COMPANY
vs.
CHICAGO, PEORIA & ST. LOUIS RAILWAY Company. } Consolidated Cause.

In the matter of the intervening petition of Huntting Elevator Company.

Order Allowing Appeal and Approving Bond.

Now on this first day of June, 1897, the same being one of the days of the January term, A. D. 1897, of this court, comes C. H. Bosworth, receiver herein, and files his petition for appeal from the order and decree of the court entered herein on the 5th day of April, 1897; and it appearing to the court that said petition is in due form, it is hereby—

Ordered, adjudged and decreed that the prayer of said petition be, and the same is hereby granted; that the appeal be, and the same is hereby allowed to said C. H. Bosworth, receiver, from the said order and decree of April 5th, 1897, to the United States circuit court of appeals for the seventh circuit, upon the said C. H. Bosworth, as such receiver, entering into bond in the sum of five hundred dollars, with surety to be approved by this court; which bond it appears to the court is herewith submitted and approved.

Petition of the C., P. & St. L. R'y Co.

In the Circuit Court of the United States, Southern District of Illinois.

MERCANTILE TRUST COMPANY ET AL.
vs.
CHICAGO, PEORIA & ST. LOUIS RAILWAY Company *et al.* } Consolidated Cause.

In the matter of the intervening petition of Huntting Elevator Company.

Application of the Chicago, Peoria & St. Louis Railroad Company of Illinois to be Made Party Defendant and for Leave to Appeal.

Now comes the Chicago, Peoria & St. Louis Railroad Company of Illinois, and shows to his honorable court that on the 10th
361 day of July, 1895, a decree was entered in the original foreclosure cause pending in this court, in which The Mercantile Trust Company *et al.* were complainants, and The Chicago, Peoria & St. Louis Railway Company *et al.* were defendants, for the foreclosure and sale of all the property of said defendant railway company; that in and by said decree it was provided, among other things, that the purchasers of said property and their assigns might be made parties to all intervening petitions filed in such original cause, and might also appeal from any decree that might be entered in this court upon said intervening petitions; that on the 21st day of September, 1895, pursuant to said decree of foreclosure and sale, Stuart Brown, Esq., as master commissioner, sold said property to a reorganizing committee, and pursuant to a decree of this court entered herein on the 1st day of February, 1896, executed a deed to said property to the assignees of said reorganization committee, to wit: the Chicago, Peoria & St. Louis Railroad Company of Illinois; your petitioner further respectfully shows that in and by said decree of February 1, 1896, it was provided that the said Chicago, Peoria & St. Louis Railroad Company of Illinois, shall be substituted in place of said reorganization committee as a party to this cause, and shall have the right to appear herein and to procure and defend such proceedings as it may be advised for the protection of its interests; and shall have all the other rights and privileges to which, under said decree of foreclosure and the order confirming the sale thereunder, the purchaser at such sale is entitled.

Your petitioner further respectfully represents unto this court, that on the 5th day of April, 1897, a final decree was entered in the above-entitled cause, directing C. H. Bosworth, receiver, to pay to said intervening petitioner the sum of $2,600.95; and this petitioner further represents unto this court that it has assigned errors, which it charges were made by this court against it in the matter of said intervening petitions, particularly specifying the errors complained of, and now here presents said assignment of errors to be filed with the clerk of this court; and

Thereupon, this petitioner prays that it may be made a party to said intervening petition, and that this court will grant to it an appeal from said final decree; and that the amount of bond and the time within which such bond and certificate of evidence shall be filed may be fixed by this court.

CHICAGO, PEORIA & ST. LOUIS RAILROAD COMPANY OF ILLINOIS,
By BLUFORD WILSON, *Its Solicitor.*

(Indorsed:) Filed July 17, 1897. James T. Jones, clerk.

362 *Assignment of Errors by the C., P. & St. L. R'y Co.*

In the Circuit Court of the United States for Southern District of Illinois.

MERCANTILE TRUST COMPANY
vs.
CHICAGO, PEORIA AND ST. LOUIS RAILWAY COMPANY. } Consolidated Cause.

In the matter of the intervening petition of Huntting Elevator Company.

Assignment of Errors.

And now comes the Chicago, Peoria and St. Louis Railroad Company of Illinois, by Bluford Wilson and P. B. Warren, its solicitors, and says there is manifest error in the record and proceedings in the above-entitled judgment and decree; and specifies the following, to wit:

1. The court erred in overruling the exceptions filed by the receiver to the report of the master.

2. The court erred in failing and refusing to sustain the exceptions filed by the receiver to the report of the master.

3. The court erred in ordering and adjudging that the petitioner was entitled to a valid and first lien on the property of the defendant railway company ahead of the mortgage indebtedness, and upon all of the property and income of the purchasers purchased at the foreclosure sale of said railway property.

4. The court erred in failing and refusing to order, adjudge and decree, that the claim of the *inventor* was not entitled to a valid and

first lien on the property of the defendant railway company ahead of the mortgage indebtedness, and upon all of the property and income of the purchasers, purchased at the foreclosure sale of said railway property.

5. The court erred in ordering, adjudging and decreeing that said receiver pay to the intervening petitioner the sum of $2,600.95, with interest thereon from the date of the filing of the master's report, together with the costs in this case.

6. The court erred in ordering, adjudging and decreeing that if said amount was not paid by the receiver, within the time there limited, the said receiver be directed to take possession of all of said property and operate the same, and out of the net earnings pay said amount.

Whereby, the plaintiff in error prays that said judgment and decree be reversed and annulled, with directions to the lower court to dismiss said intervening petition.

BLUFORD WILSON,
PHILIP BARTON WARREN,
Solicitors for Chicago, Peoria and St. Louis Railroad Company of Illinois.

(Indorsed:) Filed July 17, 1897. James T. Jones, clerk.

363 *Bond on Appeal of the C., P. & St. L. R'y Co.*

In the Circuit Court of the United States for Southern District of Illinois.

MERCANTILE TRUST COMPANY
vs.
CHICAGO, PEORIA & ST. LOUIS RAILWAY Company. } Consolidated Cause.

In the matter of the intervening petition of Huntting Elevator Company.

Bond.

Know all men by these presents that we, The Chicago, Peoria & St. Louis Railroad Company of Illinois, as principal, and Bluford Wilson as surety are held and firmly bound unto the said Huntting Elevator Company in the penal sum of five hundred dollars, for the payment of which, well and truly to be made, the said Chicago, Peoria & St. Louis Railroad Company of Illinois as such binds itself and its successor, and the said surety binds himself, his heirs, and personal representatives, jointly and severally by these presents.

Dated this 17th day of July, 1897.

The condition of this obligation is such that whereas, on the 5th day of April, 1897, in the circuit court of the United States for the southern district of Illinois, in the above-entitled cause, it was ordered, adjudged and decreed by the court that the above-bounden

Chicago, Peoria & St. Louis Railroad Company of Illinois should pay over to the said Huntting Elevator Company the sum of $2,600.95, and from which decree the said Chicago, Peoria & St. Louis Railroad Company of Illinois has appealed to the United States circuit court of appeals for the seventh circuit, and upon the condition that the Chicago, Peoria & St. Louis Railroad Company of Illinois should enter into bond in the sum of five hundred dollars, with surety approved by the court:

Now, therefore, if the said Chicago, Peoria & St. Louis Railroad Company of Illinois shall well and truly, without delay, prosecute the said appeal with effect, and shall pay all costs and damages that may be adjudged against it by reason of said appeal, and all costs that may accrue therein in case of dismissal of said appeal by appellant, then this obligation to be null and void, otherwise to remain in full force and effect.

CHICAGO, PEORIA & ST. LOUIS RAILROAD COMPANY OF ILLINOIS,
By F. W. HUIDEKOPER, *Pres't.* [SEAL.]
BLUFORD WILSON. [SEAL.]

Attest: CHAS. D. MEYER, *Secretary.* [SEAL.]

Approved:
WILLIAM J. ALLEN,
United States District Judge.

(Indorsed:) Filed July 17, 1897. James T. Jones, clerk.

364–404 *Order Making C., P. & St. L. R'y Co. Party Defendant, Allowing Appeal, and Approving Bond.*

In the Circuit Court of the United States, Southern District of Illinois.

MERCANTILE TRUST COMPANY ET AL.
vs.
CHICAGO, PEORIA & ST. LOUIS RAILWAY COMPANY *et al.* } Consolidated Cause.

In the matter of the intervening petition of Huntting Elevator Company.

Order of Court Making The Chicago, Peoria & St. Louis Railroad Company of Illinois Party Defendant and Granting Leave to Appeal from Final Decree.

This cause coming on to be further heard upon the application of the Chicago, Peoria & St. Louis Railroad Company of Illinois to be made a party defendant to the above-entitled intervening petition, and for leave to appeal from the decree entered in this cause on the 5th day of April, 1897, and the court being fully advised in the premises, upon consideration thereof, does hereby grant leave unto said Chicago, Peoria & St. Louis Railroad Company of Illinois to be

made party defendant to said intervening petition; and does also hereby grant unto said Chicago, Peoria & St. Louis Railroad Company of Illinois an appeal from said final decree of this court to the circuit court of appeals of the United States for the seventh circuit upon the said Chicago, Peoria & St. Louis Railroad Company of Illinois entering into bond in the sum of five hundred dollars ($500.00) with approved surety.

* * * * * * *

405–410 And afterwards, on the same day, to wit: on the twenty-fifth day of February, 1898, in the October term last aforesaid, the following further proceedings were had and entered of record, to wit:

Decree. Entered Feb. 25, 1898.

FRIDAY, *February* 25, 1898.

Before Hon. William A. Woods, circuit judge: Hon. James G. Jenkins, circuit judge; Hon. John W. Showalter, circuit judge.

MERCANTILE TRUST COMPANY
vs.
CHICAGO, PEORIA & ST. LOUIS RAILWAY COMPANY ET AL.

In the Matter of the Intervening Petition of Huntting Elevator Company. } 453.

C. H. BOSWORTH, Receiver, etc.,
vs.
HUNTTING ELEVATOR COMPANY.

Appeal from the circuit court of the United States for the southern district of Illinois.

This cause came on to be heard on the transcript of the record from the circuit court of the United States for the southern district of Illinois and was argued by counsel.

On consideration whereof, it is now here ordered, adjudged and decreed, by this court, that the decree of the said circuit court, in this cause be, and the same is hereby reversed with costs; and that this cause be, and the same is, hereby remanded to the said circuit court with directions to dismiss the petition.

* * * * * * *

411 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable the judges of the United States circuit court of appeals for the seventh circuit, Greeting:

[Seal of the Supreme Court of the United States.]

Being informed that there is now pending before you a suit in which C. H. Bosworth, as receiver of the Chicago, Peoria & St. Louis Railway Company, and The Chicago, Peoria & St. Louis

Railway Company are appellants and The Huntting Elevator Company is appellee, No. 453, which suit was removed into the said circuit court of appeals by virtue of an appeal from the circuit court of the United States for the southern district of Illinois, and we being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said circuit court of appeals and removed into the Supreme Court
412 of the United States, do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the tenth day of May, in the year of our Lord one thousand eight hundred and ninety-eight.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

[Endorsed:] Case No. 16,857. Supreme Court of the United States. No. 284, October term, 1898. The Huntting Elevator Company *vs.* C. H. Bosworth, rec'r, &c. Writ of certiorari and return. Filed May 18, 1898. Oliver T. Morton, clerk. Office Supreme Court U. S. Filed May 26, 1898. James H. McKenney, clerk.

413 UNITED STATES OF AMERICA, *Seventh Circuit,* } *ss:*

In obedience to the command of the foregoing writ of certiorari and in pursuance of the stipulation of the parties, a full and true copy of which is hereto attached, I do hereby certify and return that the transcript of the record filed with the application to the Supreme Court of the United States for a writ of certiorari in the case of C. H. Bosworth, receiver of the Chicago, Peoria & St. Louis Railway Company, and The Chicago, Peoria & St. Louis Railway Company, appellants, and The Huntting Elevator Company, appellee, is a full, true, and complete transcript of the record upon which said cause was heard in the United States circuit court of appeals for the seventh circuit, together with all proceedings in said court.

Seal United States Circuit Court of Appeals, Seventh Circuit.

In testimony whereof I hereunto subscribe my name and affix the seal of said United States circuit court of appeals for the seventh circuit, at the city of Chicago, this 18th day of May, A. D. 1898.

OLIVER T. MORTON,
Clerk United States Circuit Court of Appeals for the Seventh Circuit.

414 & 415 In the United States Circuit Court of Appeals for the Seventh Circuit, October Term, A. D. 1897.

MERCANTILE TRUST COMPANY
vs.
CHICAGO, PEORIA & ST. LOUIS RAILWAY COMPANY ET AL.

In the matter of the intervening petition of the Huntting Elevator Company.

C. H. BOSWORTH, Receiver, etc., Appellant,
vs.
THE HUNTTING ELEVATOR COMPANY, Appellee.

It is stipulated by and between the parties hereto, by their respective counsel, that the certified copy of the transcript of record filed by the clerk of this court in the Supreme Court of the United States in the application there made for a writ of certiorari in the above-entitled cause, there entitled The Huntting Elevator Company *vs.* C. H. Bosworth, receiver, &c., No. 644, all to the October term, 1897, of said court, shall be taken as the return to said writ of certiorari granted by said Supreme Court in said cause on the 10th day of May, A. D. 1898.

Dated May 16th, 1898.

GEO. R. PECK,
BURTON HANSON,
Solicitors for Huntting Elevator Co.
BLUFORD WILSON,
PHILIP BARTON WARREN,
Solicitors for C. H. Bosworth, Receiver.

Endorsed: United States circuit court of appeals, seventh circuit. Mercantile Trust Company *vs.* Chicago, Peoria & St. Louis Railway Company *et al.* In the matter of the intervening petition of the Huntting Elevator Company. C. H. Bosworth, receiver, etc., appellant, *vs.* The Huntting Elevator Company. Stipulation. Filed May 18, 1898. Oliver T. Morton, clerk.

416 In the Supreme Court of the United States, October Term, A. D. 1898.

MERCANTILE TRUST COMPANY
vs.
CHICAGO, PEORIA & ST. LOUIS RAILWAY COMPANY ET AL. } No. 284.

In the matter of the intervening petition of the Huntting Elevator Company.

THE HUNTTING ELEVATOR COMPANY, Petitioner,
vs.
C. H. BOSWORTH, Receiver of the Chicago, Peoria & St. Louis Railway Company, Respondent.

Stipulation for Printing Portions of the Record.

Whereas certain portions of the transcript of record in the above-entitled cause and the cause entitled Jacob Rau, petitioner, *vs.* C. H. Bosworth, receiver of the Chicago, Peoria & St. Louis Railway Company, respondent, No. 285, October term, A. D. 1898, of this court, such as the amended intervening petition, the answer thereto, as well as the answer to the original intervening petitions, the entire evidence taken, the opinion of the judges of the circuit court of appeals, as well as various other matters, rulings, proceedings, and doings, are in all respects identical:

Now, therefore, for the purpose of saving to the parties the expense of printing the entire transcript of record in the above-entitled cause, it is stipulated and agreed that the entire transcript of record in the aforesaid Rau case shall be printed, and that only the following portions of the transcript of record in the above-entitled cause shall be printed, to wit:

417 1. Intervening petition, found on page 23 and succeeding pages of the transcript of record, and proceedings in United States circuit court of appeals for the seventh circuit, filed in the above-entitled cause in this court, in the matter of the application for a writ of certiorari.

2. Report of master, found on page 58 and succeeding pages of said transcript of record.

3. Exhibit to said master's report, entitled T. McMichael & Son'-report, found on page 60 and succeeding pages of said transcript of record.

4. Exceptions to master's report, found on page 70 and succeeding pages of said transcript of record.

5. Order overruling exceptions to master's report, found on page 73 of said transcript of record.

6. Decree, found on page 73 of said transcript of record.

7. Petition for appeal, found on page 357 of said transcript of record.

8. Assignment of errors by receiver, found on page 358 of said transcript of record.

8½. Appeal bond of said receiver, found on page 359 of said transcript of record.

9. Order allowing receiver's appeal, found on page 360 of transcript of record.

10. Petition of Chicago, Peoria & St. Louis Railway Company to be made a party and for leave to appeal, found on pages 360 and 361 of said transcript of record.

11. Assignment of errors by said railroad company, found on page 362 of said transcript of record.

12. Appeal bond of said railroad company, found on page 363 of said transcript of record.

13. Order making said railway company party and granting appeal, found on page 364 of said transcript of record.

14. Decree of United States circuit court of appeals, found on page 405 of said transcript of record.

418 It is further stipulated and agreed that this cause shall be heard and considered by this court upon the transcript of record in the aforesaid Rau case, No. 285, October term, 1898, of this court, in connection with such portions of the transcript of record in the above-entitled cause as shall be printed under this stipulation, and that the amended intervening petition, the answer thereto, as well as the answer to the original intervening petition, the entire evidence taken, the opinions of the judges of the circuit court of appeals, as well as various other matters, rulings, proceedings, and doings as contained and found in the transcript of record in the aforesaid Rau case, shall for all purposes be treated and considered the same as if they had been printed and included within the printed transcript of record in the above-entitled cause.

Dated July 14th, 1898.

GEORGE R. PECK,
BURTON HANSON,
Counsel for Petitioner.
BLUFORD WILSON,
P. B. WARREN,
Counsel for Respondent.

419 [Endorsed:] Case No. 16,857. Supreme Court U. S., October term, 1898. Term No., 284. The Huntting Elevator Co., petitioner, *vs.* C. H. Bosworth, rec'r, &c., *et al.* Stipulation to omit parts of record in printing. Filed July 23, 1898.

Endorsed on cover: Case No. 16,857. U. S. C. C. of appeals, 7th circuit. Term No., 284. The Huntting Elevator Company, petitioner, *vs.* C. H. Bosworth, receiver of the Chicago, Peoria & St. Louis Railway Company, and The Chicago, Peoria & St. Louis Railway Co. Filed April 26, 1898.

12 6.8
D84
644

Office Supreme Court
FILED.
APR 26 1898
JAMES H. McKENNEY
CL

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1897.

THE MERCANTILE TRUST COMPANY,
Complainant,
vs.
CHICAGO, PEORIA & ST. LOUIS RAILWAY COMPANY et al.,
Defendants.

In the matter of the Intervening Petitions of the Chicago, Milwaukee & St. Paul Railway Company, The Huntting Elevator Company and Jacob Rau.

Petition of the Chicago, Milwaukee & St. Paul Railway Company, The Huntting Elevator Company and Jacob Rau, for Writs of Certiorari, to the United States Circuit Court of Appeals for the Seventh Circuit.

GEO. R. PECK,
BURTON HANSON,
COUNSEL FOR PETITIONERS.

The Gunthorp-Warren Printing Company, 53 Dearborn St., Chicago.

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1897.

CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, THE HUNTTING ELEVATOR COMPANY AND JACOB RAU,
Petitioners.

Petitions for Writs of Certiorari.

Petition for Writs of Certiorari requiring the United States Circuit Court of Appeals for the Seventh Circuit to certify to the Supreme Court for its review and determination the cases of

C. H. BOSWORTH, RECEIVER, ET AL.,
Appellants,
vs.
CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY,
Appellee.

C. H. BOSWORTH, RECEIVER, ET AL.,
Appellants,
vs.
THE HUNTTING ELEVATOR COMPANY,
Appellee.

C. H. BOSWORTH, RECEIVER, ET AL.,
Appellants,
vs.
JACOB RAU,
Appellee.

---

which said appellees were intervenors in the suit of *Mercantile Trust Company* v. *The Chicago, Peoria and St. Louis Railway Company et al.*, which last mentioned

suit was brought in the Circuit Court of the United States for the Southern District of Illinois, to foreclose a certain mortgage or deed of trust given by said Chicago, Peoria and St. Louis Railway Company to said Mercantile Trust Company, in which suit said Bosworth was appointed Receiver of said Chicago, Peoria and St. Louis Railway.

TO THE HONORABLE SUPREME COURT OF THE UNITED STATES:

The Chicago, Milwaukee and St. Paul Railway Company, the Huntting Elevator Company and Jacob Rau separately petition and show to this honorable court as follows:

First. That these cases involved the same question and were heard as one case before the Master, the Circuit Court and the Circuit Court of Appeals, and have from their inception been treated by the parties and the courts in which they have been pending as one case, and your petitioners have therefore united in making this petition, but it is presented to this court as the separate petition of each of said petitioners.

The question involved in these cases is this: Sixty cars loaded with barley consigned from points in Iowa, Minnesota and Wisconsin to St. Louis, Missouri, were destroyed by fire, while in transit, at East St. Louis, Illinois. The petitioners claim that they were in the possession of the Receiver at the time of the fire, while the Receiver contends that he had delivered them to the next connecting carrier, the Terminal Railroad Association of St. Louis, and that they were in the possession of that Association at the time the loss occurred. The question therefore is, what constitutes a delivery of property in car-load lots from one carrier to another, while in

course of transportation? By reason of the rule adopted by the Federal courts in

Myrick v. *R. R. Co.*, 107 U. S., 102,
R. R. Co. v. *Jones*, 155 U. S., 334,

that the carrier in whose possession property that is in course of transportation over several connecting lines is, at the time of loss or damage, is alone liable, unless the initial carrier, by a special through contract of carriage that is certain and definite in its terms, assumes such liability, this question becomes one of great gravity and importance, for it affects the interests of all persons who are compelled to ship their products over several connecting lines of carriers to get them to market, and who may be unable to make a special contract with the initial carrier that it will assume liability for all loss and damage to the property transported, whether occurring on its or any one of the lines of the several connecting carriers.

And while this court, in *Pratt* v. *Railway Company*, 95 U. S., 43, had occasion to pass upon the question of the delivery of *package freight* as between connecting carriers, it has never considered the question, What constitutes a delivery of freight in *car-load lots* when in course of transportation over several connecting lines of carriers? And by recurring to the opinions filed in these cases by each one of the Circuit judges it will be seen that there exists differences of opinion among said judges concerning what constitutes a delivery of freight in car-load from one carrier to another, as well as concerning the rule announced in the Pratt case when applied to the question of delivery as it arises in these cases.

These cases were instituted by the filing of intervening petitions in the aforesaid suit of the *Mercantile Trust Company* v. the *Chicago, Peoria & St. Louis Railway Com-*

pany to foreclose a mortgage or trust deed given by the railway company in which said Bosworth was appointed Receiver. The grounds of the petitions were that the cars and the barley they contained at the time they were destroyed by fire were in the possession of the Receiver, and that he negligently allowed them to stand or to be stored on tracks near by a long wooden warehouse that was filled with loose hay, through and into which locomotive engines were continually passing and repassing, which warehouse taking fire, was itself consumed, along with said cars and their contents. The Receiver denied that the cars were in his possession, and alleged that before the fire occurred he had delivered them and their contents to the next connecting carrier, the Terminal Railroad Association of St. Louis, and that they were in the possession of that Association at the time of the fire and that that Association negligently placed them alongside said wooden warehouse, which he characterized in his answer as "a vertible fire-trap." The matters in controversy were referred to the Honorable Stuart Brown, of Springfield, Illinois, the Master in chancery of that court, to take the testimony and report thereon to the court. The report of the Master being in favor of the intervenors, exceptions were filed thereto by the Receiver. The report and exceptions came before the Circuit Court, the Honorable William J. Allen, District Judge, presiding, for hearing, whereupon the exceptions were overruled and decrees entered in favor of the intervenors for the amounts reported by the Master, as follows:

Chicago, Milwaukee and St. Paul Railway Company	$9,033.73
S. Y. Hyde Elevator Company	2,154.53
Huntting Elevator Company	2,600.95

Thomas McMichael & Son	3,169.25
W. W. Cargill Company	1,253.23
Jacob Rau	1,144.07
Henry Rippe	1,165.67
Gilchrist & Co	805.00

Appeals were taken from the decrees entered in the cases of the Chicago, Milwaukee and St. Paul Railway Company, the Huntting Elevator Company and Jacob Rau. No appeals were taken in the other cases for the reason that it was stipulated that the decrees in those cases should abide the result of the appeals in the three cases above named. The appeals came on for argument before the United States Circuit Court of Appeals on the 25th day of October, 1897, and were held under advisement until the 25th day of February, 1898, when each one of the Circuit judges comprising said court handed down a written opinion, Circuit Judges Woods and Showalter holding that the decrees should be reversed and the intervening petitions dismissed, each basing his opinion upon reasons that were entirely different from the other, while Circuit Judge Jenkins filed a dissenting opinion fully sustaining the report of the Master in chancery as well as the decree of the Circuit Court. It therefore appears that the Master in chancery, the District judge who presided at the Circuit, and one of the Circuit judges sitting in the Court of Appeals held that the cars and their contents at the time they were destroyed by fire had not been delivered to the Terminal Association but were in the possession of the Receiver, and that he was liable therefor, while the two remaining Circuit Judges held that the Receiver had made a delivery of said cars and their contents to the next succeeding carrier, the Terminal Railroad Association of St. Louis, but based their opinions and conclusions upon entirely different reasons.

Second. Your petitioners show that it appears by the record of said causes in said Circuit Court of Appeals, a certified copy of which is herewith filed in this court and presented as a part of this application, in accordance with the rule of this court, that this litigation arises upon the following state of facts:

That the Chicago, Milwaukee and St. Paul Railway Company is a corporation organized and existing under and by virtue of the laws of the State of Wisconsin, and is a citizen of that state, and as such was a common carrier of freight from points in Iowa, Minnesota and Wisconsin, to Rock Island, one of its terminii in the State of Illinois, and that it was the owner of fifty-four of the sixty cars in which the barley in question was transported, that thirty-eight of said fifty-four cars, together with their contents, were totally destroyed at East St. Louis while in the possession of said Receiver, and that the value thereof as stipulated by the parties was $9,033.73, the remaining sixteen cars, which were partially destroyed, were repaired by the Receiver and returned to said railway company; that the Huntting Elevator Company, a corporation organized and existing under and by virtue of the laws of the State of Iowa, and a citizen of that state, Jacob Rau, a citizen of the State of Minnesota, James N. Gilchist and Colen F. Bell, citizens of said State of Iowa, engaged in business as partners under the firm name of Gilchrist & Co., at McGregor, in said state, Thomas C. McMichael and William McMichael, citizens of said State of Iowa, and engaged in business as partners under the firm name of McMichael & Son, at McGregor, in said state, the S. Y. Hyde Elevator Company, a corporation organized and existing under the laws of the State of Wisconsin, and a citizen of said state, and the W. W.

Cargill Company, a corporation organized and existing under the laws of the State of Wisconsin, and a citizen of that state, were engaged in the business of buying barley and shipping the same from various points in the States of Iowa, Minnesota and Wisconsin to St. Louis, Missouri; that their shipments of barley originated at stations on the line of railroad of the Chicago, Milwaukee and St. Paul Railway Company, and usually in cars of that company, and by that company transported to Rock Island, Illinois, one of the terminii of its line of road, and at that place the same were delivered to the Rock Island and Peoria Railroad Company, a connecting carrier, and by said last named company transported to Peoria, in said State of Illinois, and there delivered to the Chicago, Peoria and St. Louis Railway Company, a connecting carrier, which company was being operated by said Bosworth, as Receiver, and will hereafter be called the Receiver's company, and by that company transported to East St. Louis, Illinois, there to be delivered by the Receiver's company upon receiving orders from the consignees of said barley, to the Terminal Railroad Association of St. Louis, or the Wiggins Ferry Company, or some other connecting carrier, thence to be taken to its destination at St. Louis and there delivered to the consignees. This was the usual route employed by these parties for the shipment of their barley to St. Louis.

The Receiver's company had no terminal facilities whatever at East St. Louis, which was the southern terminus of its line of road; it had neither yard room nor switching facilities. It therefore entered into a contract with the Terminal Railroad Association of St. Louis whereby is secured the necessary yard room for handling and storing its cars, and switch engines and crews for

switching its cars to and from its main track and the tracks which it had the use of under its contract with the Terminal Association, and for making and breaking up its trains and for doing the necessary work of handling and moving its cars, for which the Receiver's company paid the Terminal Association a stated amount per car for each car handled. (Rau Rec., 111, 112.)

That on the evening of the 28th day of October, 1894, sixty cars loaded with barley, while standing on the tracks which the Receiver's company had the use of under its contract with the Terminal Association, were either damaged or totally destroyed by fire, said fire originating in the wooden warehouse hereinbefore referred to and characterized by the Receiver's answer as a "veritable fire-trap." That all of these sixty cars were loaded with barley at various stations on the railroad of the Chicago, Milwaukee and St. Paul Railway Company in Wisconsin, Minnesota and Iowa, and were all consigned to certain consignees at St. Louis, Missouri; that in due course of transportation said cars were delivered to the Receiver's company at said Peoria, and by that company hauled from said Peoria to the end of its line at said East St. Louis. At that point its road engines were uncoupled from the trains which brought the cars to East St. Louis and taken to the round house of the Terminal Association, which stored them under the aforesaid agreement. Thereupon and in pursuance of the agreement between the Receiver's company and the Terminal Association, whereby the latter furnished yard room, tracks and switching service for the Receiver's company, a switch engine and crew of the Terminal Association switched the cars from the place where they were left standing on the main track of the Receiver's company to the tracks which that company

had the use of under its agreement with the Terminal Association. There they remained standing until they were destroyed by fire as aforesaid.

It further appears from the record in these cases that under the custom which existed at East St. Louis in reference to handling the barley business of the Receiver's company, after cars containing barley had been placed upon these tracks which the Receiver's company used its agent at East St. Louis would take the way-bills under which the cars had been delivered into the possession of the Receiver's company and hauled to East St. Louis, which way-bills contained on their face the consignor, consignee, number, destination and contents of the car, and notify "*the consignee that we* (the receiver) *had a car numbered "so and so, loaded with barley, where do you want it?*" (Rau Rec., 205.) In due time, this notice which the Receiver's agent had sent to the consignee the consignee would send back to the Receiver's agent endorsed on the back with directions where the car should be sent. *This was done under an arrangement between the consignees of this barley and the Receiver's company, that it would hold their barley at East St. Louis subject to their orders*—so the Receiver's agent testified:

Q. Was that a different and separate transaction having reference to the orginal contract between the shippers and the C., M. & St. P.; *was it a new arrangement the consignee directed and controlled*, or was it the original arrangement named by the shipper?

A. *A new arrangement by the consignee, who placed orders with us to hold this barley.* (Rau Rec., 205.)

Thereupon the Receiver's agent would make out a way-bill containing the name of the consignee, the destination, number and contents of the car, take it to the agent of the

Terminal Association, deliver it to him, and take his receipt. Until this way-bill was received, the Terminal Association of course had no knowledge concerning these cars further than it had switched them from the main line of the Receiver's company to the tracks which that company had the use of under the aforesaid agreement, and had earned in consequence a certain amount, depending upon the number of cars switched. It did not and could not know until this way-bill was received that the cars contained barley, nor what they contained, or that they were destined to St. Louis or to some other point, and if so, where or to whom, or by what route they were consigned.

Upon the receipt of this way-bill from the Receiver's company's agent, the agent of the Terminal Association would give directions to the switching crew and they would take the car out of the Receiver's portion of the yard and place it in the Terminal Association's portion of the yard and there take it to the connection or destination indicated on the way-bill. (Rau Rec., 82.) For this service the Receiver's company paid the Terminal Association a stated amount for each car so switched. It further appears that cotemporaneous with the delivery of the way-bill by the Receiver to the Terminal Association, and not before, if the car named in the way-bill was the car of some company other than the Receiver's company, the Receiver's agent at East St. Louis would notify the car accountant of his company that car numbered, for example, 2,500, belonging to the Chicago, Milwaukee and St. Paul Railway Company, had that day been delivered to the Terminal Association. Thereupon such car accountant would send a formal notice, called a junction car report, to the car accountant of the Chicago, Milwaukee

and St. Paul Railway Company, notifying him of the delivery of the car to the Terminal Association. Up to the time of receiving this junction report, the car was charged to the Receiver's company on the books of the Chicago, Milwaukee and St. Paul Railway Company.

It further appears from the record that the Receiver made no proof of having ever sent to the consignee the usual and customary notice of the arrival of any of the cars in controversy. It also appears, and the fact is not in dispute, that no way-bill had been delivered to the Terminal Association for any of the cars in controversy, and that no notice had been sent by the Receiver's agent to his car accountant, or by that car accountant to the car accountant of the Chicago, Milwaukee and St. Paul Railway Company, that any of the cars in controversy had been delivered to the Terminal Association.

It also appears that the cars in controversy at the time they were destroyed by fire were standing on the tracks which the Receiver's company commonly use under its agreement with the Terminal Association, granting it track and yard room and other terminal facilities at East St. Louis. This fact was stipulated. (Rau Rec., 115.)

It also appears that after the foregoing facts had been testified to, counsel for Receiver's company stated that he had not been able to obtain the testimony of the consignees as he had anticipated, and therefore asked for further time, stating that he expected to prove by them that the Terminal Association, as an inducement to them to ship their barley by that route, agreed to hold the cars on *its tracks* at East St. Louis, and offered them other facilities in *its yards* at that place. To avoid further delay counsel for appellees admitted that if the persons named were present they would testify substantially as

counsel stated he expected they would testify—assuming, of course, that this arrangement, if it existed, became operative only after the cars had been delivered into the possession of the Terminal Association so that they could be said to be on *its tracks* and in *its yards*, and that delivery could not be said to have been made until the agent of the Receiver's company had delivered to the agent of the Terminal Association the customary way-bill containing the names of the consignor and consignee, the route and destination, and the number and contents of the car, and taken the receipt therefor. For until this had been done the Receiver's company had not parted with either the possession or control of the cars, and the Terminal Association could not know which of the cars that were standing on the tracks which the Receiver's company used were routed over its tracks, and if so, what they contained, where they were destined or to whom consigned, and until this information was received it would not, as a matter of course, accept delivery. (Rau Rec., 82, 86, 87, 90, 95.) And such delivery not having been made of any of the cars in controversy, the arrangement which counsel stated he expected to prove had no application to this case.

Palmer v. *C., B. & Q. R. R. Co.*, 13 Atl. Rep., 818.

Mt. Vernon Co. v. *Ala. Gt. North. Ry. Co.*, 92 Ala., 296–298.

Texas & Pacific Ry. Co. v. *Clayton*, 51 U. S. App., 676.

Third. It was upon the foregoing facts that the court rendered its decision reversing the decrees of the court below. Presiding Judge Woods held that the decrees should be reversed on the ground that the arrangement

between the consignees and Terminal Association, which counsel for Receiver's company stated he expected to prove, became effective immediately upon the cars being placed on the tracks which the Receiver's company used under its agreement with the Terminal Association; that as soon as the cars were so placed on these tracks, that Association would be deemed to be holding them, notwithstanding there had been no delivery of them in the usual and customary way that deliveries were made at that place by the Receiver's company to the Terminal Association, and that this would be true although the Terminal Association had no knowledge of the destination, consignee or contents of the car. He cites as sustaining his position the case of *Pratt* v. *Ry. Co.*, 95 U. S. 43, and the case of *Mount Vernon Company* v. *Ala. Gt. North. Ry. Co.*, 92 Ala., 296.

Judge JENKINS writes a dissenting opinion, holding that the decrees should be affirmed. In commenting upon the opinion of the presiding judge he says:

"I am unable to concur in this conclusion. I have sought to show that there had been no delivery of these cars to the Terminal Association. It had not knowledge of their destination. It had not knowledge of the consignees of them. They were subject to the direction and control of the Receiver. The Terminal Association under its contract with the Receiver had placed these cars upon these tracks for the Receiver and for a compensation agreed upon. It therein was the agent of the Receiver. It could not know whether these cars were to be transported over its line or the lines of the Wiggins Ferry Company; it could not know in what direction they were to be transported, or their ultimate destination; when it had placed the cars on its track pursuant to its contract with the Receiver, it had nothing further to do with them until the Receiver had dispossessed himself of possession and control and had invested the Terminal Association therewith. I cannot comprehend that the general agree-

ment between the Terminal Association and consignees can become operative with respect to the contents of these cars until delivery to the Terminal Asaociation and it had been invested with the exclusive possession and the exclusive control of them. The force of the reasoning is not perceived whereby it is held that because in fact these goods were ultimately to go to persons who had contracted with the Terminal Association—of which contract Receiver had no knowledge—therefore these goods were held under that contract before delivery in fact to the Terminal Association and before it was invested with exclusive control of them. * * * The question here is whether the Receiver is absolved from liability ; whether failing a delivery of the cars to the Terminal Association, failing a surrender by the Receiver of control over them, with ignorance upon the part of the Terminal Association of their destination or their consignees, the agreement between the Terminal Association and the consignee had become operative with respect to these goods. I think not. If the Receiver had directed that the Terminal Association under its contract with him should transfer these goods to the Wiggins Ferry Company, his order must have received recognition and have been carried out by the Terminal Association, and it cannot be doubted that up to the time of the fire in question the goods were so subject to the Receiver's direction and control. For these reasons I think that the decrees appealed from should be affirmed."

He also cites *Pratt* v. *Ry. Co.*, *supra*, and *Mount Vernon Company* v. *Ala. Gt. North. Ry. Co.*, *supra*, to sustain his position.

Judge Showalter, in his opinion, holds that the moment the switch engine of the Terminal Association was coupled to the train of the Receiver's company, for the purpose of switching it from the main line of that company to the tracks which the Receiver's company used under its agreement with the Terminal Association, the Receiver's company's liability as a common carrier ceased and that of the Terminal Association began, and that the Receiver's

company was not again invested with any liability either as a common carrier or as a warehouseman in regard to cars so handled. He also cites the cases of *Pratt* v. *Ry. Co.*, and *Mount Vernon Company* v. *Ala. Gt. North. Ry. Co.*, to sustain his position.

These opinions are a part of the certified copy of the transcript of record herein.

Fourth. Your petitioners further show that they are informed and believe and do therefore respectfully represent and submit that there are good and sufficient reasons why the judgment of said Circuit Court of Appeals should not be allowed to stand as the final judgment in these cases, but that the record herein made should be reviewed and these cases finally determined by this Honorable Court; and they therefore present this, their separate petition, to that end, and in support thereof urge the following reasons:

1. That the opinions delivered by Judges Woods and Showalter, the two judges constituting a majority of said Circuit Court of Appeals, are not entitled to any strong presumption of correctness, for they are not only opposed to each other, but are opposed to those announced by Judges Jenkins and Allen and by Master in Chancery Brown.

2. That by reason of the difference of opinion among the judges of the Circuit Court of Appeals the questions of law involved in these cases are in a state of grave and serious uncertainty, and that the decision of the majority of the judges of said Circuit Court of Appeals is not consistent with the decisions of this Honorable Court, especially in the cases of *Pratt* v. *Railway Co.*, 95 U. S., 43, and *Covington Stockyard* case, 139 U. S., 128; nor with the decision of the Circuit Court of Appeals for the Second Circuit in *Texas and Pacific Railway Co.* v.

Clayton, 51 U. S. App., 676, S. C. 84 Fed. Rep., 305, nor with the decisions of the state courts:

Mt. Vernon Co., v. *Ala. Gt. Nor. Ry. Co.*, 92 Ala., 296, 298.

Palmer v. *C. B. & Q. R. R. Co.*, 13 Atl. Rep., 818.

3. That the questions involved in the correct decision of these cases are most important, as will appear by a reading of the opinions of the judges of said Circuit Court of Appeals. The amount involved in these cases is not only large, but there are numerous other claims pending against the Receiver growing out of the same fire, which the parties have agreed shall abide the final determination of these cases. But aside from any monetary consideration, the commercial considerations involved are all-important. In recent years there has come into existence at all large commercial centers in the west, like Chicago, St. Louis, Kansas City, St. Paul and Minneapolis, corporations that are organized for the double purpose of supplying terminal facilities to railread companies which are unprovided with such facilities, and of transporting such freight as is received from their connections to the points and places of industry that are reached by their various tracks. The Terminal Railroad Association of St. Louis is such a corporation. It not only furnishes terminal facilities such as yard and track room for handling and storing cars and switch engines and crews to such railway companies as have need of such facilities at East St. Louis, but transports all freight which such companies deliver to it from East St. Louis to such places as its various tracks reach in East St. Louis and St. Louis. The Receiver's company had no terminal facilities whatever at East St. Louis, the southern terminus of its line of rail-

road. It contracted with that Association for the necessary yard room and track facilities and switch engine and crews for handling its cars, making and breaking up its trains and for storage room for a reasonable number of cars, not exceeding 150 at any one time. Under this contract so much of tracks numbered from forty to fifty in the yards of the Terminal Association as was necessary to give the Receiver's company room for 150 cars was set aside and used by that company in the transaction of its business. The cars of barley in controversy at the time they were destroyed by fire were standing on some one or more of these ten tracks, having been switched there from the main line of the Receiver's company by the switch engine and crew of the Terminal Association under its agreement to furnish that company with certain terminal facilities. No way-bill or other manifest, giving the name of the consignee, or route, or destination, or the number or contents of the car, had been tendered or delivered to the Terminal Association for any of the cars, although the invariable custom and practice at that place between the two companies was to tender such a way-bill whenever it was intended to make a delivery of a car of freight; and a delivery was never regarded as having been made until a way-bill had been tendered and accepted and the car named therein taken from the tracks which the Receiver's company used under its agreement with the Terminal Association, and switched to the tracks of that Association. Proceedings were taken against the Receiver's company to recover the value of the cars and their contents, the claim being that they were in the possession of that company when the loss occurred. After a litigation lasting three years, the claimants are advised by a divided court, Judge Jenkins dissenting, and Judges Woods and Showalter disagreeing with each other

quite as much as with Judge Jenkins, that the wrong carrier has been pursued, and that their remedy is against the Terminal Association. These cases, therefore, not only involve the question, what constitutes a delivery of freight in car-load lots, as between carriers in the ordinary course of business, but as between carriers sustaining to each other the relation which existed between the Receiver's company and the Terminal Association by virtue of the contract under which the former acquired from the latter the use of such terminal facilities as its needs at East St. Louis required. And when it is considered that arrangements such as existed between the Receiver's company and the Terminal Association at East St. Louis are in operation in nearly all the large commercial and railway centers of the United States, and that there are hourly vast quantities of freight of immense value in cars standing on tracks under circumstances and conditions that are substantially similar to those that are present in these cases, and the interest which the owners of such freight in the event of loss have in knowing in which carrier the possession is, the questions involved in these cases are too important to be left in the unsatisfactory and unsettled condition in which they are left by the opinions of the two judges constituting a majority of said Circuit Court of Appeals.

Wherefore, your petitioners respectfully and separately pray that writs of *certiorari* may be issued out of and under the seal of this Honorable Court, directed to the United States Circuit Court of Appeals for the Seventh Circuit, commanding said court to certify and send to this court on a day certain, to be therein designated, a full and complete transcript of the record, and all proceedings of said Circuit Court of Appeals in each of the said cases therein, entitled as follows:

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT—OCTOBER TERM, A. D. 1897.

MERCANTILE TRUST COMPANY
vs.
CHICAGO, PEORIA & ST. LOUIS RAILWAY COMPANY *et al.*

In the matter of the intervening petition of the Chicago, Milwaukee & St. Paul Railway Company.

C. H. Bosworth, Receiver, etc., *Appellant*,
vs.
The Chicago, Milwaukee & St. Paul Railway Company, *Appellee*.
No. 442.

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT—OCTOBER TERM, A. D. 1897.

MERCANTILE TRUST COMPANY
vs.
CHICAGO, PEORIA & ST. LOUIS RAILWAY COMPANY *et al.*

In the matter of the intervening petition of Jacob Rau.

C. H. Bosworth, Receiver, etc., *Appellant*,
vs.
Jacob Rau, *Appellee*.
No. 452.

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT—OCTOBER TERM, A. D. 1897.

MERCANTILE TRUST COMPANY
vs.
CHICAGO, PEORIA & ST. LOUIS RAILWAY COMPANY *et al.*

In the matter of the intervening petition of the Huntting Elevator Company.

C. H. Bosworth, Receiver, etc., *Appellant*,
vs.
The Huntting Elevator Company, *Appellee.*
No. 453.

to the end that each of said cases may be reviewed and determined by this court as provided in section 6 of the act of Congress entitled "An act to establish Circuit Courts of Appeal and to regulate in certain cases the jurisdiction of the Courts of the United States, and for other purposes," approved March 3, 1891; and that each of your petitioners may have such other or further relief or remedy in the premises as to this court may seem appropriate and in conformity with the said act, and that the said decision of the said Circuit Court of Appeals in each of said cases may be reversed by this honorable court, and your petitioners will ever pray.

CHICAGO, MILWAUKEE AND ST. PAUL RAILWAY COMPANY,
THE HUNTINGTON ELEVATOR COMPANY, and
JACOB RAU,
Petitioners,

By Geo. R. Peck, Curtis Hanson
Their Attorneys

STATE OF ILLINOIS, } ss.
COUNTY OF COOK. }

Burton Hanson, being duly sworn, says that he is one of the attorneys for the Chicago, Milwaukee and St. Paul Railway Company, the Huntting Elevator Company and Jacob Rau, the petitioners above named, and as such attorney he has had personal charge for said petitioners of the cases in the foregoing petition mentioned, in the Circuit Court of the United States for the Southern District of Illinois and in the United States Circuit Court of Appeals for the Seventh Circuit; that he has read the foregoing petition, and that the facts therein stated are true, to the best of his knowledge, information and belief.

Burton Hanson

Subscribed and sworn to before me this 16th day of April, A. D. 1898.

(Seal)

W. D. Millard
Notary Public, Cook County, Ill.

IN THE SUPREME COURT OF THE UNITED STATES—
OCTOBER TERM, 1897.

To Honorable Bluford Wilson and Philip Barton Warren, Attorneys for C. H. Bosworth, Receiver, named in the annexed and foregoing petition:

In the cases mentioned in the annexed and foregoing petition, you will please take notice that on Monday, the

2nd day of May, 1898, at the opening of court, or as soon thereafter as counsel can be heard, the petition of which the foregoing is a copy will be submitted to the Supreme Court of the United States for a decision of the said court thereon.

Yours, &c.,

Geo. R. Peck

Burton Hanson

Attorneys for Chicago, Milwaukee and St. Paul Railway Company, The Huntting Elevator Company, and Jacob Rau, Petitioners.

Service of a copy of the foregoing notice and of the petition for *certiorari* annexed thereto is hereby admitted this ..... day of ....., 1898.

.....

.....

Attorneys for C. H. Bosworth, Receiver, &c.

No. 1444. 1897. 613

Office Supreme Court
FILED.
APR 26 1898
JAMES H. McKENNEY

Brief of Peck & Hanson for Pet

Filed April 26, 1898.

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1897.

THE MERCANTILE TRUST COMPANY,
Complainant,
vs.
CHICAGO, PEORIA & ST. LOUIS RAILWAY COMPANY et al.,
Defendants.

In the matter of the Intervening Petitions of the Chicago, Milwaukee & St. Paul Railway Company, The Huntting Elevator Company and Jacob Rau.

Brief in Support of the Separate Petitions of the Chicago, Milwaukee & St. Paul Railway Company, The Huntting Elevator Company and Jacob Rau, for Writs of Certiorari, to the United States Circuit Court of Appeals for the Seventh Circuit.

GEO. R. PECK,
BURTON HANSON,
COUNSEL FOR PETITIONERS.

The Gunthorp-Warren Printing Company, 53 Dearborn St., Chicago.

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1897.

THE MERCANTILE TRUST COMPANY,
Complainant,
vs.
CHICAGO, PEORIA & ST. LOUIS RAILWAY COMPANY ET AL.,
Defendants.

In the matter of the Intervening Petitions of the Chicago, Milwaukee & St. Paul Railway Company, The Huntting Elevator Company and Jacob Rau.

Brief in Support of the separate Petitions of the Chicago, Milwaukee & St. Paul Railway Company, The Huntting Elevator Company and Jacob Rau, for Writs of Certiorari, requiring the United States Circuit Court of Appeals for the Seventh Circuit to certify to the Supreme Court for its review and determination the cases of

C. H. BOSWORTH, RECEIVER, ET AL.,
Appellants,
vs.
CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY,
Appellee.

C. H. BOSWORTH, RECEIVER, ET AL.,
Appellants,
vs.
THE HUNTTING ELEVATOR COMPANY,
Appellee.

C. H. BOSWORTH, RECEIVER, ET AL.,
Appellants,
vs.
JACOB RAU,
Appellee.

STATEMENT OF FACTS.

The case presented by the record and the petition for writs of certiorari is this: One Bosworth, as Receiver,

operated the Chicago, Peoria and St. Louis Railway Company, which had a line of railroad from Peoria to East St. Louis, both in the State of Illinois. Having no terminal facilities whatever of his own at the latter place, the Receiver entered into a contract with the Terminal Railroad Association of St. Louis, whereby that Association undertook and agreed to furnish him necessary yard room, track facilities, switch engines and crews for handling his business, making and breaking up his trains that arrived at and departed from that place, *and storage room for a reasonable number of cars, not exceeding 150 at any one time.* Under this agreement, so much of tracks numbered from 40 to 50 as was necessary to give the Receiver storage room for that number of cars was, quoting from the second subdivision of the contract, "set aside for the use of the party of the second part," the Receiver. (Rau Rec., 111.) And these were the tracks that were commonly and usually used by the Receiver for handling and storing his cars and upon which they were placed upon their arrival at East St. Louis, and where they remained standing until they were delivered to the Terminal Association, or other disposition had been made of them. (Rau Rec., 76, 78, 81, 82, 95, 101, 181, 202, 229, 232; and Stipulation 2d Subdiv. Rau Rec., 115.) The practice under this agreement was that upon the arrival at East St. Louis of the Receiver's trains, they would come to a stop at the end of his track and there they would stand until a switch engine of the Terminal Association would hitch to them and switch them to some one or more of the ten tracks which the Receiver had the use of under his agreement with that association. After having been switched to these tracks, the cars would remain there until the Receiver gave directions to

the Terminal Association for their further shipment or transportation. If they were destined to St. Louis or to points beyond by way of the Terminal Association, the Receiver would make out a manifest, called a way-bill, which contained on its face the name of the consignor and consignee, the route and destination and number, name and contents of the cars, and deliver that to the agent of the Terminal Association and take his receipt therefor. Thereupon the switching crew of the Terminal Association would take the way-bill, take the cars named therein out of the Receiver's portion of the yard and place them in its portion of the yard, put them into a train and take them to the connection or destination indicated by the way-bill. If the cars were routed by some other line than that of the Terminal Association, such as the Wiggins Ferry, a competing line, they would be switched by the Terminal Association from the tracks which the Receiver used under his agreement with that Association, to the tracks of the ferry company. This service was performed under the agreement with the Terminal Association. (See 4th subdivision thereof, Rau Rec., 11.) The manner in which the Receiver's cars were handled after their arrival at East St. Louis is probably best told by the witnesses themselves. They are George H. Felps, agent of the Terminal Association, W. H. Calvert, agent of the Receiver, E. R. Stapleton, his chief clerk, and the Receiver himself.

Geo. H. Felps testified as follows:

Q. What company breaks up this train and places the cars on the tracks marked red?

A. The Terminal Railroad Association.

Q. That done under the agreement introduced here?

A. Yes sir; at a certain sum per car.

Q. What sum?

A. Fifty cents a car.

Q. When that train is broken up, as you have stated, and the cars set on the tracks marked red, what is then done with these cars?

A. We are done with the cars then until we get way-bills from the agent of the C. P. & St. L.

Q. From the receiver?

A. Yes, sir; from the agent of the receiver.

Q. What is a way-bill?

A. A manifest showing what disposition is to be made of the freight.

Q. When you receive the way-bill of a car what do you do then?

A. Card that car out, and our yardmen are instructed to switch it out and deliver it according to the instructions.

Q. Does the way-bill contain the number of the car and destination?

A. Yes, sir; consignee, destination and route.

Q. *When you receive this way-bill and switch the car out, where do you take it?*

A. *Take the car out of their yard, their portion of the yard, and place it in the train in our portion of the yard, and take it to the connection or destination indicated.* (Rau Rec., 82.)

And further at page 86 he testified:

Q. What was the custom in respect to handling these cars set out on these tracks, after they had been set there on the part of the Terminal Association?

A. *We had nothing to do with them at all until we received way-bills, if they stood there till doomsday.*

E. R. Stapleton, witness for Receiver, testified as follows:

Direct Examination.

Q. A train comes in on this "Y," what is then done with it by the receiver, if anything?

A. The trains stops on the "Y" and the receiver is done with them.

Q. Is that true?

A. Yes, sir; the receiver does not handle the cars or control their handling in a *direct* way after that. (Rau Rec., 199.)

Cross-Examination.

Q. The major asked if the receiver was done with them, so far as handling the cars?

A. So far as the handling of the cars.

Q. *The receiver did have something else to do with them with reference to sending them on to St. Louis in the way of giving way-bills?*

A. *Yes, sir; giving way-bills.*

Q. When those way-bills are made out by the agent at East St. Louis they are delivered to the Terminal Association?

A. And their receipt taken.

Q. Of the way-bill?

A. Yes, sir.

Q. So you would have the receipt of every way-bill delivered?

A. Yes, sir.

Q. Then the Terminal Association would take these cars according to the direction on the way-bill?

A. Yes, sir. (Rau Rec., 203, 204.)

W. H. Calvert, a witness for Receiver, testified as follows:

Q. When way-bills were made out by the receiver at East St. Louis for barley consigned to St. Louis and other points to which the Terminal Association was to take it, where were the way-bills made out—at your office?

A. Yes, sir.

Q. That would be way-bills of all cars going to some other points than East St. Louis?

A. Yes, sir; except such as were to go to Wiggins Ferry, in which case the way-bills would be delivered to the Wiggins Ferry.

Q. None of the cars in controversy here—barley—went by the way of Wiggins Ferry?

A. No, sir. (Rau Rec., 255.)

C. H. Bosworth, the receiver, testified as follows:

Q. Isn't it a universal custom whenever there is a car delivered from one company to another, consigned to a point beyond, before that car is taken by the company to which it is delivered and moved on to its destination a way-bill accompanies that car and is delivered to the receiving company?

A. I can't say it is a universal custom.

Q. How would the receiving company know what to do with a car without a way-bill?

A. Might take the directions of the agent; *I will state it is undoubtedly generally the case.* (Rau Rec., 247.)

And on page 248 the Receiver testified that until the Terminal Association received a way-bill it would not undertake to move a car, and that until a way-bill was delivered or instructions given to the agent of the Terminal Association the car was subject to his, the Receiver's orders.

The cars of barley in controversy came into the possession of the Receiver at Peoria from a connecting line of road. Their destination was St. Louis, Missouri. They were hauled by the Receiver to the end of his main track at East St. Louis. Upon their arrival there they were switched from such main track by a switch engine of the Terminal Association and placed upon some one or more of the ten tracks which the Receiver had the use of in the yards of that Association under the aforesaid agreement. There they remained standing until they were destroyed by fire, which occurred on the evening of the 28th day of October, 1894. *No way-bill had been delivered by the Receiver to the Terminal Association for any of the cars in controversy.* The petitioners base their right to recover on the ground that the cars and the barley they contained at the time they were destroyed by fire were in the possession of the Receiver and that he negligently

allowed them to stand or to be stored on tracks near by a long wooden warehouse that was filled with loose hay, through and into which locomotivs engines were continually passing and repassing, which warehouse taking fire was itself consumed along with said cars and their contents. The Receiver denies that the cars were in his possession at the time they were destroyed by fire, and alleges that before the fire occurred he had delivered them and their contents to the next connecting carrier, the Terminal Association, and that they were in the possession of that Association at the time of the fire, and that that Association negligently placed them alongside said wooden warehouse, which he characterizes as "a veritable fire-trap." The pleadings, therefore, raise a single issue: Were the cars and their contents at the time they were destroyed in the possession of the Receiver, or had they been delivered by him to the next succeeding carrier, the Terminal Association? The Master to whom the cases were referred, District Judge Allen, who presided at the Circuit, and Circuit Judge Jenkins, held that there had been no delivery of the cars by the Receiver to the Terminal Association and that he was liable for the value of the cars and their contents, while Circuit Judges Woods and Showalter held that there had been a delivery of the cars by the Receiver to the Terminal Association, but each disagreed with the other as to the reasons therefor.

ARGUMENT.

I.

Circuit Judge Showalter, in his opinion, holds that the act of the Terminal Association, in switching the cars from the Receiver's main track to the tracks which he used under his agreement with that Association, constituted a delivery of the cars by the Receiver to the Terminal Association, and that a delivery of the customary way-bill was not necessary to a delivery of the cars. This holding, we submit, is not only utterly opposed to the custom under which deliveries of cars were made by the Receiver to the Terminal Association at East St. Louis, as disclosed by the undisputed testimony, but is in conflict with the decisions of this and other courts.

There is no dispute in the testimony as to the custom under which deliveries of cars were made at East St. Louis by the Receiver to the Terminal Association. This custom was that a car was never treated as delivered until a way-bill therefor was passed to the Terminal Association. It is apparent to anyone who is at all familiar with the transportation business of the country that this must, in the very nature of things, be the custom and practice, for it can readily be seen what confusion and delay would arise in the interchange of traffic in car-loads between the various railway companies if each company should, upon the arrival of cars at the terminus of its line of road, or at such other place where delivery is made to the next succeeding carrier, claim that it had made a delivery by merely placing or causing cars to be placed upon certain tracks without notifying such succeeding carrier, either

by way-bill or otherwise, of the delivery, or giving any instructions or directions for their further transportation. It is clearly apparent that without such a way-bill, or something that is its equivalent, the succeeding carrier would not know what disposition to make of the car. It would not know its contents, its route or destination or the party to whom it should be delivered, neither would it have any data upon which it could make a charge for transporting it. All this information is withheld by the preceding carrier, in this case the Receiver, until the customary way-bill is delivered, and so long as it is withheld from the succeeding carrier, there cannot, in the very nature of the transaction, be a delivery of the property to which such information applies. It is to the interest of both shippers and carriers, as well as to the general commerce of the country, that there should exist no doubt as to what constitutes a delivery of property in course of transportation, as between connecting carriers.

That cars were never treated as delivered to the Terminal Association until the Receiver had delivered way-bills therefor, is clearly shown by another circumstance which the undisputed testimony discloses, which is that whenever the Receiver delivered cars to that Association, if such cars belonged to some other company, his car accountant immediately on the very day of the delivery of way bills therefor, and not until then, reported to the company owning the cars the fact that certain of its cars, giving their numbers, had on that day been delivered by the receiver to the Terminal Association. This was the practice at East St. Louis as well as at all junction points. (Rau Rec. 88, 89, 90, 98, 106, 153, 154, 155, 247.) These reports are called junction reports, and by means of them each railway company is advised of the where-

abouts of its cars when they are out of its possession. Mr. Beecham, car accountant of the Chicago, Milwaukee and St. Paul Railway Company, and Mr. Bradley, the Receiver's car accountant, both testified that the Receiver had not reported any of the cars in controversy as having been delivered to the Terminal Association. (Rau Rec., 99, 106, 154, 155. This was because no way-bill had been delivered by the Receiver to the Terminal Association of any of the cars of barley in controversy. And in this connection, the attention of the court is called to the significant fact that prior to and up to the time of the fire, whenever the Receiver delivered a way-bill to the Terminal Association, at the same time such way-bill was delivered, he caused to be sent by his car accountant to the car accountant of the company whose cars were delivered, by such way-bill, a report called a junction report, advising that company of the delivery of the car named in such way-bill to the Terminal Association, and not until a way-bill had been delivered for such car was that car reported delivered to that Association. So that a junction report and a way-bill went hand in hand with every car that was delivered by the Receiver to the Terminal Association. For example: Mr. Felps, the agent of the Terminal Association, testified (Rau Rec., 86, 87) that on the 28th day of October, the day of the fire, the Receiver delivered three cars of the Chicago, Milwaukee and St. Paul Railway Company, Nos. 2,100, 31,872 and 16,562, to the Terminal Association by delivering way-bills therefor. By referring to the testimony of Mr. Beecham (Rau Rec., 100, 101, and Exhibit "E." Rau Rec., 128, 129), it will be seen that on the very day the way-bills for these three cars were delivered to the Terminal Association, the Re-

ceiver's car accountant reported these three cars as having been delivered on that day to the Terminal Association.

Now what does Mr. Felps say he did immediately upon the receipt of the way-bills for these three cars?

Q. What did you do after receiving these way-bills with respect to those cars?

A. Cars carded out as usual to their proper connections or destinations.

Q. Following the directions of the way-bills?

A. Yes, sir; in accordance with the instructions.

Q. Was the service rendered by the Terminal Association, in breaking up of the train of the receiver when it came in on the "Y," and placing the cars on these tracks marked red, a separate and distinct service from the work you did after receiving the way-bills?

A. It was a separate and distinct service.

Q. Explain how and why?

A. We received for this service, taking care of the cars for which we had way-bills, a separate revenue.

Q. Separate from what?

A. From making and breaking up trains. (Rec., 87.)

By an examination of the testimony it will be seen that in every instance the Receiver did not report a car as having been delivered to the Terminal Association until he had delivered a way-bill therefor to that Association.

This custom is in accord with the views of text writers and the decisions of the courts. Ray, on Freight Carriers, 388, says:

"The placing of a car by an initial carrier on the side track of a connecting carrier, without giving the latter any notice and without marking it with the name and address of the consignee, *or sending any way-bill or shipping directions*, does not establish the relation of common carrier between the initial and the connecting carrier.

The following cases hold the same rule:

Tex. & Pac. Ry. Co. v. *Clayton*, U. S. C. C. A., 2nd Cir., 51 U. S. App., 676; s. c. 84 Fed. Rep., 305.

Mt. Vernon Car Co. v. *Ala. G. S. Ry. Co.*, 92 Ala., 296.

Ins. Co. v. *Ry. Co.*, 55 Tenn. Repts., 268.

Palmer v. *Pa. Co.*, Conn. Sup. Ct., 13 Atl. Rep., 818.

In *Mt. Vernon Car Co.* v. *Ala. G. S. Ry. Co.*, *supra*, the court say:

"The same rule is applicable in the case of connecting carriers; the responsibility peculiar to the common carrier is not devolved on the next connecting carrier until the receiving carrier has delivered the goods to the former with directions for their shipment, the place of destination and to whom consigned. *Until this is done the relation of common carrier is not established between the shipper and the connecting carrier.*"

In *Texas & Pacific Ry. Co.* v. *Clayton*, *supra*, the question of delivery between connecting carriers was discussed by Circuit Judge WALLACE. He says:

"It may be safely affirmed, as a proposition applicable to all cases, that a deposit of the goods with notice, express or implied, at any place where the second carrier has control of them, conformable with usage created by the course of business between the two carriers, is a sufficient delivery, and discharges the first carrier. The liability of the second carrier begins when that of the first ends. * * * In the present case the cotton had never been placed within the control of the steamship line of the defendant. * * * Before the steamship line could have identified it for the purpose of removal, and after that, before they could have exercised any control over it, the co-operation and assistance of the defendant were necessary."

So here the Receiver up to the time the cars of barley were destroyed had full control over their further movement. For without the information which would be conveyed by the delivery of the customary way-bill, the Terminal Association could not identify them for further transportation, neither could it transport them, as it had no knowledge concerning their contents, their route, destination or consignee. This information was all with the Receiver, and until he imparted it to the Terminal Association by the delivery of the customary way-bill, that Association could exercise no control over the cars in the way of their further transportation.

These decisions are all in harmony with the rule of this court announced in *Pratt* v. *Grand Trunk Ry. Co.*, 95 U. S., 43, cited by Circuit Judge Jenkins in his dissenting opinion. In this case the freight in controversy was *package* freight. Something more is required in making a delivery of a car loaded with merchandise from one carrier to another, than is required in making a delivery of package freight. The package is addressed and the receiving company can readily ascertain from the package itself the consignee and destination, but a freight car has no marks nor address upon it showing the consignee, route or destination. This information is only found in the way-bill, and until that is delivered there can not in the very nature of things be a delivery of the car.

The Terminal Association in switching the Receiver's cars from his main track and placing them upon the tracks which he had the use of under his agreement, did not thereby take possession of such cars or accept delivery of them as a carrier. Whatever possession it thereby had of the cars was under its agreement to furnish the Receiver the use of certain tracks in its yards for *his* cars,

and to switch *his* cars from his main line to certain other of *his* tracks. As between the petitioners and the Receiver, these tracks were his tracks and the switch engines his engines, as much so as if he had owned them outright. And the cars and the freight they contain while on these tracks were the Receiver's so far as handling and caring for them. The preamble of the agreement makes this plain:

"That, whereas, the party of the first part undertakes to give to the party of the second part (the receiver) terminal facilities at East St. Louis for the handling of *its* (his) trains, care of *its* (his) engines and cars, and the handling and care of *its* (his) freight, under the following terms and conditions:"

While this agreement did not exclude the relation of connecting carriers as between the Receiver and the Terminal Association, neither did it change their relation. The same acts were required of the Receiver in making a delivery of cars to the Terminal Association as would have been required had there been no contract relations between the two and the Receiver had owned the necessary terminal facilities at East St. Louis. In treating the question as to what constitutes a delivery as between the Receiver and the Terminal Association, the agreement by which the Receiver acquired the use of certain terminal facilities at that point should be wholly eliminated and the case treated precisely as it would be treated if the Receiver owned the terminal facilities which he used under his agreement with that Association. Carriers cannot shift responsibilities by contracting with others to perform the duty incumbent upon them. (*R. R. Co.* v. *Reich*, 32 S. W. Rep., 818.) It must, therefore, be regarded as a fact that the terminals which the Receiver used at East St. Louis were for all purposes, as

between him and the petitioners, his terminals, and that the tracks, engines and the men employed about them in the handling of cars brought there by his trains were all his. So that when his trains arrived at East St. Louis, were broken up, and the cars placed on certain tracks which he had the use of, under his agreement as between him and the petitioners, the engines and the cars doing this work were his, and the tracks upon which the cars were left standing until they were way-billed out were likewise his tracks. The case, therefore, stands as if the Receiver had, in fact, owned the terminals which he, in fact, used, and the trains had been broken up by his own switch engine and switching crew and the cars placed upon his own tracks. Had the Receiver owned the facilities which he had the use of and, in fact, did use under his agreement with the Terminal Association, no one would for a moment contend that the breaking up of his trains and placing the cars upon the tracks where they stood at the time of the fire constituted a delivery of them to the Terminal Association. And yet there is as much warrant for such a contention as there is to justify the claim which is now put forth, that he had delivered these cars and their contents to that Association by simply having them switched from his main track to other of his tracks which he used in handling his business at East St. Louis. Up to the time that the Terminal Association took possession of cars under way-bills which had been delivered to it, it did nothing with them that the Receiver would not have done had these terminal facilities been his own. The Terminal Association therefore acted merely as the servant or agent of the Receiver in breaking up his trains and placing his cars on certain tracks, for which it received from the Receiver fifty cents a car. *One rail-*

way company does not pay to another railway company fifty cents a car for the privilege of delivering cars to it. And the fact that the Receiver under his agreement paid the Terminal Association fifty cents a car for breaking up his trains and placing them on these tracks, shows conclusively that in doing this work it was not expected nor intended by either of the parties that a delivery was thereby made of the cars so handled to the Terminal Association.

It was stipulated between the parties that the cars of barley in controversy at the time they were destroyed by fire were standing on the tracks that were commonly used by the Receiver under his agreement with the Terminal Association. (Rau Rec., 115.) This fact in connection with the undisputed testimony in the case, that no way-bill had been delivered for any of the cars to the Terminal Association, and that the Receiver had not reported the delivery of any of the cars to the Chicago, Milwaueee and St. Paul Railway Company, the company owning them, proves conclusively that the cars at the time of the fire had not yet been delivered to the Terminal Association and fully sustains the position of Circuit Judge Jenkins in his dissenting opinion.

II.

Circuit Judge Wood bases his conclusion that there had been a delivery of the cars and their contents to the Terminal Association wholly upon the statement of counsel for the Receiver made at the conclusion of the hearing before the master (Rau Rec., 260), that he expected certain of the consignees to have been present and expected to prove by them that the Terminal Association

had an arrangement with them by which it agreed to hold cars of barley on "*their tracks*" (meaning the tracks of the Terminal Association) at East St. Louis, and give them other facilities in "*their yards*" at that place, and the consent of counsel for petitioners that the witnesses, if present, would testify substantially as counsel expected they would testify.

We feel that a wrong construction has not only been given to this statement, but an importance attached to it which is not warranted by facts which are indisputably proven, and which we believe should be all-controlling in this case.

In considering the question of the delivery of freight as between connecting carriers when the same is in course of transportation, the rule that when possession is once proven to be in certain one of several carriers, the presumption is that such possession continues in that carrier until it is proven to be elsewhere, and that the burden is upon that carrier to show delivery, should not be lost sight of. And this burden is not met by offering proof that is conflicting or uncertain in its character or meaning, or proof that is susceptible of different constructions, theories and inferences. *The proof must be certain and convincing, and, taken as a whole, consistent with no other theory than that of delivery. This is the rule.* And it should be adhered to strictly in view of the other rule of the federal courts, which is not the rule in most of the state courts, that the carrier in whose possession property is at the time of loss is alone responsible, and not the initial carrier, unless it is shown by clear and satisfactory proof that such carrier contracted for liability beyond its line; and such liability is never inferred from proof that is uncertain or doubtful.

Myrick v. *R. R. Co.*, 107 U. S., 102.

The difficulties which beset shippers over several connecting lines of carriers, in case their property is lost, unless the rule that the carrier in whose possession the property is once shown to be shall show delivery by proof that is certain, clear and satisfactory, is strictly enforced, is well illustrated in the case at bar. After a litigation lasting three years, the claimants are now advised by a divided court, each judge differing with the other, that they have been pursuing the wrong carrier. They have no contract with the initial carrier for a through liability; they made the best investigation they could, and after tracing the property into the possession of the Receiver, and being informed that the Receiver's agent at East St. Louis, under the direction of the Receiver, in making proofs of loss to the insurance companies concerning the destruction of the property involved in this litigation, stated under oath that the cars in question were standing on tracks that were used by the Receiver (Rau Rec., 176); that no way-bill had ever been delierved by the Receiver to that Association of any of the cars, although it was an invariable custom to do so whenever a delivery was made; that the notices and directions in reference to the handling of the barley after it had reached East St. Louis, and while it was standing on these tracks, all passed between the consignees and the Receiver, they naturally concluded that the Receiver had the possession of their barley at the time it was lost, and accordingly intervened, as they were solicited by the Receiver to do, in the foreclosure suit.

Returning to the proposition that possession of this property having been proven to be in the Receiver, the burden was upon him to show by proof that was clear and satisfactory that he had delivered it to the Terminal

Association, let us briefly recur to what the testimony indisputably shows;

1. The Receiver had no terminal facilities at East St. Lous. He therefore contracted with the Terminal Association for the necessary yard room and track facilities and switch engines and crews for the handling of his cars, making and breaking up his trains that arrived at and departed from that place, *and for storage room for a reasonable number of cars not exceeding one hundred and fifty at any one time.* Under this agreement so much of tracks numbered from forty to fifty as was necessary to give the Receiver storage room for 150 cars was, quoting from the second subdivision of the contract, "set aside for the use of the party of the second part"—the Receiver. And these were the tracks that were commonly and usually used by the Receiver for handling and storing his cars, and upon which they stood until they were delivered to the Terminal Association by the switch engine of that Association taking them off these tracks and placing them in its portion of the yard. (Testimony of Roeder, Rau Rec., 76, 78; Felps, 81, 82, 95, 101; Lester, 188; Stapleton, 202; Calvert, 229, 232.) To identify these tracks they were marked red on a plat introduced in evidence. All the cars in controversy were at the time of the fire standing on some one or more of these tracks. (Rau Rec., 83, 84, 85.) *And it was stipulated by a written stipulation, signed by Receiver's counsel, that the cars in controversy at the time they were destroyed by fire were standing on the tracks that were commonly used by the Receiver under his agreement with the Terminal Association.* (Rau Rec., 115.) They were, therefore, in the Receiver's possession. The stipulation concedes this. They were placed there and were standing there in pur-

suance of the aforesaid agreement between the Receiver and the Terminal Association. The Receiver had the same right to have them switched there and stored there as though the tracks were his and the engine which placed them there was his, for he contracted and paid for this right, and so long as he occupied no more than the allotted room—150 cars—he could have stored these cars there until the right to do so ceased with the expiration of the contract. At the time of the fire there were, all told, but seventy of the Receiver's cars on these tracks. (Rau Rec., 177, 180.) So that the Receiver had room to spare. Now, how can it be reasonably urged that these cars were not as much in the physical possession of the Receiver as they would have been had he owned the tracks outright on which they stood and the engine which switched them there?

If they were, then it necessarily follows that the Terminal Association was not holding them at the time of the fire, and therefore the arrangement which counsel proposed to prove by certain absent witnesses, that it had agreed with the consignees to hold their cars on its ("*their*) tracks" and give them other facilities in its ("*their*) yards" had not yet become effective, for the cars were not in "*their yards*" or on "*their tracks*," but were on the tracks of the Receiver.

Let us recur to the statement which counsel made: It was that he *expected* to prove by certain witnesses that the Terminal Association had agreed to hold cars on "*their tracks*" at East St. Louis and offered other facilities in and about "*their yards*" at that place. Appellees' counsel admitted that if the witnesses were present they would testify substantially as counsel stated he *expected* they would testify. (Rau Rec., 261–262.) We at

that time had no thought, and not until it was argued in opposing counsel's brief on these appeals did it ever occur to us, that it could or would be contended that this informal stipulation, made in the hurry of and for the purpose of expediting a hearing, would or could be construed in such a manner as to cover cars *while they were yet standing and being held on tracks used by the Receiver, under his agreement with that Association*, and when they had not been way-billed to that Association. Especially when the Receiver's agent had, before this statement of counsel had been made, testified positively, and at the instance of counsel for Receiver, that these cars were held by the Receiver on these tracks on orders placed with him by the consignees to hold their barley. We supposed, and we submit any counsel would reasonably have supposed under like circumstances, that this statement of counsel related only to cars after they had been delivered by the Receiver to the Terminal Association in the usual and customary way in which deliveries were made at that place, so that it could be said that the cars were standing on "*their tracks*" in "*their yards.*" We did not suppose that it would or could be construed to apply to cars while they were standing on tracks which the Receiver was using under his agreement with that Association, made for no other purpose than to give him track and yard room for handling and storing *his* cars, or to cars while they were being held on such tracks on orders placed with the Receiver's agent by the consignees to hold their barley. (Rau Rec., 205.)

The holding of Circuit Judge Woods that the supposed arrangement between the consignees and the Terminal Association had become effective as to the cars of barley

in controversy, notwithstanding there had been no delivery of them by the Receiver to the Terminal Association and notwithstanding the Receiver still had the control and direction of them, and notwithstanding the Terminal Association had not up to the time they were destroyed knowledge of consignees, route, destination or contents of the cars, is, we submit, completely and conclusively answered by Circuit Judge Jenkins in his opinion. We quote from that opinion:

"It is held by the presiding judge that by reason of a certain supposed agreement between consignees in St. Louis and the Terminal Association—to the effect that the latter, as an inducement to barley dealers to ship over its lines, would hold cars containing shipments to such consignees on the tracks of the Terminal Association at East St. Louis—the receiver was absolved and liability under such agreement imposed upon the Terminal Association so soon as these cars had under the contract with the receiver been placed upon the tracks designated for the accommodation of the receiver's cars. I am unable to concur in this conclusion. I have sought to show that there had been no delivery of these cars to the Terminal Association. It had not knowledge of their destination. It had not knowledge of the consignees of them. They were subject to the direction and control of the receiver. The Terminal Association under its contract with the receiver had placed these cars upon these tracks for the receiver and for a compensation agreed upon. It therein was the agent of the receiver. It could not know whether these cars were to be transported over its line or the lines of the Wiggins Ferry Company; it could not know in what direction they were to be transported or their ultimate destination. When it had placed the cars on these tracks pursuant to its contract with the receiver it had nothing further to do with them until the receiver had dispossessed himself of possession and control and had invested the Terminal Association therewith. I cannot comprehend that the general agreement between the Terminal Association and consignees can become operative with respect to the contents of these cars until

delivery to the Terminal Association and it had been invested with the exclusive possession and the exclusive control of them. The force of the reasoning is not perceived whereby it is held that because in fact these goods were ultimately to go to persons who had contracted with the Terminal Association—of which contract the receiver had no knowledge—therefore these goods were held under that contract before delivery in fact to the Terminal Association and before it was invested with exclusive control of them. I do not undertake to say that the Terminal Association may not be liable to the receiver for its negligent acts causing the fire whereby this property was destroyed. Neither the question nor the party is before us. The question here is, whether the receiver is absolved from liability; whether, failing a delivery of the cars to the Terminal Association, failing a surrender by the receiver of control over them, with ignorance upon the part of the Terminal Association of their destination or their consignees, the agreement between the Terminal Association and the consignee had become operative with respect to these goods. I think not. If the receiver had directed that the Terminal Association under its contract with him should transfer these goods to the Wiggins Ferry Company, his order must have received recognition and have been carried out by the Terminal Association; and it cannot be doubted that up to the time of the fire in question the goods were so subject to the receiver's direction and control. For these reasons I think that the decrees appealed from should be affirmed."

2. That cars containing barley, after they were placed on these tracks and up to the time the Receiver had delivered to the Terminal Association the customary waybills for them, and that Association had taken them off these tracks and placed them in its portion of the yard, as testified by Felps (Rau Rec., 82), they were held by the Receiver under an arrangement between him and the consignees, and not between them and the Terminal Association, there is no doubt under the testimony. For the Receiver's chief clerk, Stapleton, who was in charge of this

business at East St. Louis under Calvert, the agent, testified, in response to questions asked of him by the Receiver's counsel, that after cars loaded with barley had been placed upon these tracks he would take the way-bills which came with the cars and notify the consignees that "*we*"—meaning the Receiver, not the Terminal Association—had a car, number so and so, loaded with barley, "Where do you want it?" and at such time as he—the consignee—got ready he would send the notice back, not to the Terminal Association, but to the Receiver's agent, to send the car to Hines' brewery, or Hiland or some other point. Thereupon he, Stapleton, would make out a new way-bill for the car, deliver it to Felps, the agent of the Terminal Association, and take his receipt. Now, why was this transaction? The following question and answer will explain:

Q. Was that a different and separate transaction, having reference to the original contract between the shipper and the Chicago, Milwaukee and St. Paul; *was it a new arrangement the consignee directed and controlled, or was it the original arrangement named by the shipper?*

A. *A new arrangement by the consignee, who placed orders with us to hold his barley.* (Stapleton's testimony, Rau Rec., 205.)

To the same effect is Calvert's testimony, Rau Rec., 235, 236, and Bosworth, Receiver, 248. Now, if it is to be presumed, as it is by the opinion of the presiding Judge, that Stapleton sent to the consignee notices that the cars containing the barley in question had arrived, and asked them where they wanted them sent, then it must also be presumed that such notices were sent in pursuance with the arrangement which Stapleton says the consignee had with him to hold their barley until further orders. If this is true, then it also follows that this par-

ticular barley was not held by the Terminal Association under any arrangement which it had with the consignee to hold barley, but was held by the Receiver under the arrangement which the consignee had with him to hold their barley.

That this correctly states the case there can be no doubt, for it fully consists with the conduct of the parties in reference to this barley while it was standing on these tracks before way-bills had been delivered therefor. For up to that time all transactions concerning it were had by the consignees with the Receiver; they treated the barley as in the Receiver's possession, and the Receiver regarded himself as having possession of it. The Receiver himself testified in response to a question asked by his counsel:

"Well, I would answer that by saying the St. Louis Terminal Association up to that point (meaning the time of the delivery of the way-bill) would not have recognized any order the consignee would have made directly to them, *and we would not have attempted to make a movement*, without the consignee, who would order through our agent in East St. Louis."

In view of such testimony and like testimony from his agent Calvert (Rec., 235, 236), and his chief clerk Stapleton (Rec., 205), that this barley while it was standing in cars on these tracks before the delivery of way-bills was held by the Receiver under an arrangement with the consignees, who placed orders with him to hold their barley for further orders, and that these further orders came directly to the Receiver from the consignees, except in occasional instances (Rau Rec., 207, 208) when they got into the hands of Mr. Roeder, a joint agent, who always turned them over to the Receiver's agent, how can it reasonably be contended that this barley was at the time

it was destroyed in the possession of the Terminal Association, or was held by it under some arrangement made with the consignees for holding their barley on its tracks. Especially when there had been no delivery of it to that Association, either actual or constructive, and when that Association could not know and did not know what the cars contained until they were delivered to it in the usual manner by delivering the customary way-bill. For, does not the testimony indisputably show that after the cars were placed on these tracks, and up to the time way-bills therefor were delivered to the Terminal Association, the Receiver held them on orders placed with his agent by the consignees to hold their barley for further orders.

Stated most favorably to the Receiver, the testimony which he in fact introduced in evidence, and the testimony which he stated he *expected* to introduce in evidence, proves, or tends to prove, that the consignees had an arrangement with both the Receiver and the Terminal Association for holding barley at East St. Louis. This testimony, if reconciled as it should be, can all be given effect, for it shows that the arrangement which the consignees had with the Receiver for holding their barley was intended to apply while it was standing on the tracks which the Receiver used between the time of its arrival at East St. Louis and the time when it was way-billed over to the Terminal Association; and that the arrangement they had with the Terminal Association to hold cars on "*their tracks*," and for other facilities in "*their yards*" applied to the cars of barley after they had come into the possession of that association in the usual and customary way, by the delivery of way-bills, and had been switched into "*their yard*" and were on "*their tracks;*" *or* to cars which the Receiver could not hold on his tracks by

reason of the limited space which he had contracted for being fully occupied by other of the Receiver's cars. For the Receiver had storage room for only 150 cars at a time, and it may well be presumed that at times he did not have sufficient space to store all the cars which the consignee desired held at East St. Louis under their arrangement with the Receiver, and they, therefore, made an arrangement with the Terminal Association to store such cars as the Receiver had not room for. Your Honors can very well see what is liable to confront these barley shippers if they shall be driven to sue the Terminal Association.

It is more reasonable, and certainly more in accord with the rules of evidence, to harmonize this testimony—all coming from the Receiver's witnesses—in this manner, than it is to eliminate from the case the testimony of Stapleton, Calvert and the Receiver himself, as would have to be done if the construction given by the presiding Judge to the testimony that Receiver's counsel stated he had expected to introduce, is adhered to. Unless this testimony can be reconciled, as we think it can and should be, then it is in serious conflict, and the conclusion necessarily follows that the burden of proof which was upon the Receiver to show by clear and satisfactory evidence that he had made a delivery of these cars and their contents before the loss occurred, has not been met. For the testimony of his witness Stapleton, that barley arriving at East St. Louis was held there by the Receiver up to the time it was way-billed out under "*a new arrangement by the consignee, who placed orders with us (the receiver) to hold his barley,*" as well as the testimony of Calvert and the Receiver, is absolutely inconsistent with the theory or claim that there had been a delivery of the

barley and cars in controversy to the Terminal Association.

While on the other hand, if the arrangement which counsel for Receiver expected to prove by certain witnesses, that the Terminal Association had agreed to hold cars of barley for the consignee in *its yards* at East St. Louis, is given the construction which is placed upon it by Circuit Judge Jenkins in his opinion, viz: that this arrangement was only intended to apply to cars loaded with barley, after there had been a delivery in accordance with the usual method of making deliveries of barley by the Receiver to the Terminal Association, and as explained by Felps (Rau Rec., 82, 86), so that the cars were, quoting from counsel's statement, "*on their tracks*," it is then not only consistent with the arrangement under which the Receiver and his witnesses, Calvert and Stapleton, say the barley was held between the time of its arrival and the delivery of way-bills therefor to the Terminal Association, but is consistent with the custom which all the testimony shows prevailed at East St. Louis, that as between the Receiver and the Terminal Association a car was never treated as delivered until the Receiver had delivered to the Terminal Association the customary way-bill, containing the name of the consignor, consignee, destination, route, number and contents of the car. And a way-bill was never delivered to that Association by the Receiver for any car loaded with barley until the consignee notified the Receiver to do so. And further, until the way-bill for a car had been delivered, and not before, did the Receiver notify the company whose car he had so delivered, had been delivered. This is significant. For it shows in whose possession the car was up to the time that the way-bill therefor was delivered.

This interpretation of the testimony is likewise consistent with the construction which, we contend, should be given the contract under which the Receiver used the tracks of the Terminal Association, viz: that while his cars were standing upon the tracks which he contracted and paid for the use of, they were in his possession as much so as if he had owned the tracks absolutely.

And further, such interpretation is consistent with the stipulation of the parties, that the cars in controversy at the time of the fire were standing on the tracks which the Receiver had the use of under his agreement with the Terminal Association. (Rau Rec., 115.) This fact is likewise significant, for it shows conclusively that the very cars in controversy were in the Receiver's possession at the time of the fire, for they were at that time, and had been, ever since their arrival at East St. Louis, standing on the tracks which the Receiver had the use of under his agreement. This agreement took the place of ownership, and possession under it was the same as possession with ownership.

We therefore most respectfully but earnestly request this court to order these cases to be certified to this court for final determination. We feel that a wrong conclusion has been reached, that a wrong construction has been given to the statement of counsel for Receiver as to what he expected to prove by certain witnesses—a construction that was not intended by the parties, a construction that petitioners should not be bound by in view of the testimony of witnesses for the Receiver, that the consignees had arranged with the Receiver to hold their barley upon its arrival at East St. Louis until further orders, and of the stipulation of the parties that the particular cars in controversy were at the time of the fire standing on

the tracks which the Receiver had the use of under his agreement with the Terminal Assciation, a construction which raises a serious conflict between the testimony which counsel stated he expected to introduce, and the testimony of Stapleton, Calvert and Bosworth, which he did introduce in evidence, a construction which is far beyond that which petitioners' counsel ought reasonably to have expected in view of the testimony, which Receiver's counsel had introduced prior to the making of that statement, in reference to the arrangement which the consignees had with the Receiver for holding this barley, and the custom which all the testimony shows prevailed at East St. Louis, that a car loaded with barley, while standing on the Receiver's tracks, was never treated by the Receiver as delivered to the Terminal Association until his agent had delivered a way-bill for the car, taken the usual receipt therefor and the car switched from his portion of the yard. We feel also that Circuit Judges Woods and Showalter, in the consideration of these cases, have overlooked the well established rule of law, that when possession of property is once proven to be in a carrier, the presumption is that such possession continues until it is shown to be elsewhere: and that the burden is upon the carrier to show by a preponderance of proof—proof that is clear and satisfactory, not conflicting or as consistent with non-delivery as with delivery—that there has been a delivery of the possession either to the consignee or the succeeding carrier, whichever the case may be. This proof, we submit, is not present in these cases. For if the construction which we are contending for is not to be given to the statement of counsel, then it is at war with the testimony of his other witnesses Stapleton, Calvert and Bosworth, as well as with

nearly all the other testimony in the case which relates to the holding and delivery of cars loaded with barley at East St. Louis. A carrier upon whom the burden of proof rests to show delivery of property to a connecting carrier, especially in a suit by the owner to recover its value in case of loss, cannot and ought not to discharge that burden by testimony that is conflicting or is susceptible of two or more constructions, or is as consistent with non-delivery as with delivery. Such is the case here—if the construstion which the presiding Judge has given to counsel's statement is to prevail.

3. It is assumed by the presiding Judge that the Receiver's agents at East St. Louis had sent to the consignees the usual notice of the arrival of the cars of barley in question. There is no proof to sustain this presumption, and the master found that no notice had been sent by the Receiver's agent to the consignee. (Rau Rec., 67.) But conceding this to be true, then the other presumption inevitably follows, that such notice was sent in pursuance of the arrangement which Stapleton testified was "*a new arrangement by the consignee who placed orders with us to hold his barley.*" (Rau Rec., 205.) This leaves no room for the contention that this particular barley at the time it was destroyed was being held by the Terminal Association under an arrangement with the consignee. For the fact that the Receiver's agent sent notices to the consignees that he had certain cars loaded with barley consigned to them, giving the number of the cars in controversy, asking them where they wanted them sent, and that this was done in pursuance of an arrangement between him and the consignees to hold their barley on their orders, placed with him, shows conclusively that the particular barley in question at the time it was de-

stroyed was being held by the Receiver under his arrangement with the consignees to hold it, and not by the Terminal Association under is arrangement with the consignees. The presumption that the customary notices covering the particular cars of barley in controversy were sent by the Receiver's agent to the consignees, and that such notices were sent in pursuance of "*a new arrangement the consignee directed and controlled*"—"*a new arrangement by the consignee, who placed orders with us* (the Receiver) *to hold his barley*" (Rau Rec., 205), precludes the claim that the barley in question was being held under any other arrangement than that testified to by the Receiver's witnesses.

We, therefore, respectfully submit that a wrong construction has been given the statement of counsel for Receiver, and a value attached to it that is not warranted by the testimony, which the Receiver himself introduced. Either this is true, or the testimony which counsel expected to introduce is wholly inconsistent with the testimony which he did in fact introduce, in which event we contend that the burden of proof which was cast upon the Receiver was not met, and for that reason the conclusions of Circuit Judges Woods and Showalter are erroneous.

III.

CLAIM FOR CARS DESTROYED.

This claim rests on somewhat different grounds than do the claims for barley destroyed. Commercial necessities require that cars engaged in the freight carrying business of the country shall be exchanged between the various railway companies. This gives rise to a

system of car bookkeeping between the companies, and the necessity for the rule, which all companies recognize and act under, that each company, upon making a delivery of a car, not its own, to a connecting line shall report such delivery to the company owning the car, giving the number of the car, date of delivery and the company to which it has been delivered, and that until such delivery is so reported the car shall stand charged to the company last reported as having received it; and if destroyed while on the tracks of that company, such company shall be liable therefor the same as it would be for any other property which it might have in its possession for transportation or delivery.

That this system of car bookkeeping and rule of liability prevailed between the Receiver's company and the Chicago, Milwaukee and St. Paul Railway Company, there is no question under the testimony. Calvert, the Receiver's agent at East St. Louis, and Bradley, his car accountant, testified, as did Beecham, the car accountant of the St. Paul Company, to this system. (Rau Rec., 97, 99, 104, 101, 154.) The rule of liability for damaged or destroyed cars was testified to by both Mr. Beecham and Bosworth, the Receiver.

Mr. Beecham:

Q. Are you acquainted with the practice and custom which prevailed among the different railroads of the United States in respect to the settlement or payment for cars damaged or destroyed when in possession of companies not owning the cars?

A. Yes, sir.

Q. You may state what the practice or custom is.

A. The practice is for the company, through its master car-builder, for the companies on whose track the car is destroyed, to report such destruction to the owner of the car and to call for a history of the car, showing when

it was built, and then they deduct a depreciation and salvage and settle direct with the owners of the car if they so elect, but they may—it is optional with them to rebuild the car.

Q. So the company in whose possession the foreign car is, in case that car is damaged or destroyed, either rebuilds the car or pays the company owning it?

A. That is the universal practice.

Q. Is that the way all settlements are made between different companies with respect to damaged and destroyed cars?

A. Yes, sir; it is.

Q. So that a car of the Chicago, Milwaukee and St. Paul Railway Company, while in possession of the Chicago, Peoria and St. Louis Railway Company, if damage or destroyed, the latter company would pay the St. Paul Company for it or rebuild the car?

A. Yes, sir.

Q, You say that is the custom and practice on which all settlements are made between the different companies?

A. Uuiform practice and custom. (Rau Rec., 142.)

Mr. Bosworth:

Q. It is a custom between all railroads, if a car of the St Paul Railway is destroyed on your track, that you pay for it?

A. Yes, sir.

Q. And that is on the ground that you have possession of the car, and in accounting for the loss of it you account to the owner and pay for it; that is a well understood custom, isn't it?

A. Yes, sir.

In this connection, it should be stated that in pursuance of the custom which Mr. Beecham and Mr. Bosworth testified to, Mr. Bradley, the Receiver's car accountant, reported to Mr. Beecham under date of November 2, 1894, four days after the fire, the cars which had been destroyed by the fire belonging to the St. Paul Company. (Rau Rec., 129, 130.) This is significant, for it shows that the car accountant regarded these cars as in the possession of

the Receiver at the time they were destroyed and accordingly reported their loss to the car accountant of the St. Paul Company.

There is likewise no dispute in the testimony concerning the possession of the particular cars in controversy. At the commencement of the taking of testimony it was formally agreed between the parties, by written stipulation signed and filed, that the thirty-eight cars in controversy were at the time of the fire standing on the tracks which the Receiver commonly used under his agreement with the Terminal Association. (Rau Rec., 115.) This puts at rest all questions concerning the actual possession of these cars. It should also be borne in mind that they were not standing on these tracks for unloading there, but were awaiting orders for their further movement; the case, therefore, is not one where cars have been set on a private side-track of the consignee for unloading, in which event it might well be said they were not in the carrier's possession; but here they were in the Receiver's possession, on his tracks, awaiting further transportation. Besides this, it was an invariable rule for the Receiver to deliver to the Terminal Association a way-bill for every car delivered to that Association. No way-bill had been passed for any of the cars in controversy; no junction report had been sent to or received by the St. Paul Company for any of the cars. (Rau Rec., 100.) They all stood charged on the books of that company as being in the possession of the Receiver's company.

Mr. Beecham testified:

Q. In whose possession were these cars I have spoken of—these thirty-eight cars—who were they charged to?

A. Chicago, Peoria and St. Louis Railroad. (Rau Rec., 103.)

The case, therefore, comes to this: That as between the Receiver's company and the St. Paul company, these cars were in the possession of the former company, and under the custom which had been established by long continued practice between the companies, it is liable for their value. If custom is to be considered in determining the liability for the contents of the cars, it should likewise be considered in respect to the cars themselves. And we submit that the testimony indisputably shows that the Receiver's company was a party to a custom or practice that fastens upon it a liability for these cars, and that it cannot evade that liability by showing that the consignees of the barley had arrangements with the Terminal Association for holding cars or giving them other facilities in its yards. Whether the Receiver's company knew of this arrangement is immaterial, so far as the rights of the St. Paul company are involved. It did know that these cars were on tracks which it had the use of, and that they were charged to it as being in its possession on the books of the St. Paul company. It, therefore, knew that under the rules and custom governing the exchange of cars between the various railway companies, that its liability for these cars would continue until it had made a delivery of them in the usual way that deliveries of cars were made at that place and such delivery reported to the St. Paul company. Such delivery not having been made or reported and the cars at the time of the fire being on tracks which the Receiver's company used under its agreement with the Terminal Association to give it facilities for handling and storing cars, it conclusively follows that the liability for these cars is with that company and not with the Terminal Association.

So far as the courts have had occasion to consider this

question, they have held that a railway company is liable for the safe carriage and return of cars belonging to other companies which come into its possession in the usual course of business, the same as it is for any other property which it handles as a carrier or as a warehouseman. So long as cars of one company are in the possession of another company, that company is accountable for them as a carrier or as a warehouseman. If they have been set on a private delivery track belonging to the consignee, for loading or unloading, then they are not in the possession of the carrier, and consequently its liability is interrupted during the time they are so out of its possession (*Railway Co.* v. *Ry. Co.*, 123 Ill., 594); but if they are placed on the carrier's tracks for loading and unloading, the rule is different, and they will be regarded as in the possession of the carrier, its liability being that of a warehouseman only. (*Ry. Co.* v. *Rolling Stock Co.*, 136 Ill., 644.) We, therefore, come back to the question: Were these cars, as between the Receiver's company and the St. Paul company, in the possession of the former company at the time they were destroyed? If they were, then it is liable therefor, both under the rule of liability, which a long-continued practice and custom had created, and the decisions of the courts. We submit that, under the second subdivision of the stipulation of August 27, 1895 (Rau Rec., 115), and the rules and custom which prevailed between the two companies, under which deliveries of cars were made and reported and the accounts thereof kept, there can be no doubt as to where the possession of these cars was at the time they were destroyed, or of the Receiver's liability.

The following cases bear upon this question:

Ry. Co. v. *Ry. Co.*, 109 Ill., 135.

Ry. Co. v. *Ry. Co.*, 123 Ill., 594.
R. R. Co. v. *R. R. Co.*, 14 Allen, 462.
Ry. Co. v. *Rolling Stock Co.*, 136 Ill., 649.
Malory v. *Ry. Co.*, 39 Barb., 488.

IV.

In conclusion, it can but be said that this case could not be better stated in all its phases than is done in the dissenting opinion by Circuit Judge Jenkins, and it is urged upon this court to carefully examine and consider that opinion. It is in harmony with the case as presented by the record, it is in harmony with the succinct and able report of the Master and the decrees entered thereon by Judge Allen at the Circuit, it is in harmony with the decisions of this and other courts, it is in harmony with the manifest justice of the case. The opinions of Circuit Judges Woods and Showalter are not only opposed to each other, but they are inconsistent with the decisions of this Honorable Court, especially in the cases of *Pratt* v. *Ry. Co.*, 95 U.S., 43, and the Covington Stockyard case, 139 U. S., 128, and the decision of the United States Circuit Court of Appeals for the Second Circuit in *Texas & Pacific Ry. Co.* v. *Clayton*, 51 U. S. App. 676, and with the decisions of the state courts as announced in *Mount Vernon Co.* v. *Ala. G. S. Ry. Co.*, 92 Ala., 296, 298; *Palmer* v. *C. B. & Q. Ry. Co.*,13 Atl. Rep., 818; *Ins. Co.* v. *Ry. Co.*, 55 Tenn. Repts., 268. They are not therefore entitled to any strong presumption of correctness. They leave the question of law involved in a state of grave and serious uncertainty, and the petitioners in the predicament that one Bromley was left, after a litiga-

tion lasting several years over the loss of his portmanteau —he had neither portmanteau nor a right of action against either carrier for its recovery. *Midland Ry. Co.* v. *Bromley*, 8 J. Scott, 372 (84 E. C. L. 372, 382, note a).

To prevent the uncertainty in the law that will be occasioned if the decisions rendered by Judges Woods and Showalter are allowed to stand, this court is respectfully urged to grant writs of certiorari, requiring these cases to be sent here for review and final determination.

All of which is respectfully submitted.

GEORGE R. PECK,
BURTON HANSON,
Counsel for Petitioners.

Explainatory Note:

Refererence is made to the record in the Rau case only, for the reason that the record in the cases of the Chicago, Milwaukee and St. Paul Railway Company and the Hunting Elevator Company are the same as in the Rau case.

No. 12.

For other Briefs Herein
See Preceding case.

Supreme Court of the United States.

No. 12.—October Term, 1900.

The Huntting Elevator Company, Petitioner,
vs.
C. H. Bosworth, Receiver of the Chicago, Peoria and St. Louis Railway Company, et al.

On writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

[December 17, 1900.]

This case involves deciding whether the defendants in error are liable for the damage occasioned to certain property, resulting from a fire which occurred on October 28, 1894, in a railroad yard at East St. Louis, Illinois.

The Chicago, Peoria and St. Louis Railway Company, at the date of the fire in question, was being operated by a receiver appointed on September 22, 1893, in foreclosure proceedings instituted in the Circuit Court of the United States for the Southern District of Illinois.

On the assumption that the receiver was responsible for the damage occasioned by the fire above referred to, various persons and corporations who had suffered loss filed their interventions, asserting a liability on the part of the receiver for such damage. The intervenors were nine in number, and all but two sought recovery for the loss occasioned by the damage or destruction of barley. The claims other than for barley were asserted by the Chicago, Milwaukee and St. Paul Railway Company, and the Carr, Ryder & Engler Company; the former corporation asking to be allowed for the value of its cars, in which were contained the destroyed or damaged barley, while the latter corporation demanded the value of certain doors, sashes, &c., consigned to Birmingham, Alabama. A list of all the intervenors is given in the margin.*

The interventions which related to barley shipments alleged delivery of the cars of barley to an initial carrier, consigned to a named commission merchant in St. Louis, *via* East St. Louis; the delivery of the barley so shipped to the receiver of the Peoria Company to be "transported to its destination;" the carriage by that company as far as East St. Louis, and the damage by fire of the barley in the cars "while the same were still in

* Names of the intervenors: The Carr, Ryder and Engler Company; The Chicago, Milwaukee and St. Paul Railway Company; The S. H. Hyde Elevator Company; The W. W. Cargill Company; Jacob Rau; Gilchrist & Company, a partnership; The Huntting Elevator Company; McMichael & Son, a partnership; and Henry Rippe.

transit and on the way to destination, and in the possession and under the control" of the receiver of the Peoria Company. In the answers filed by the receiver there was no denial of the allegations contained in the intervening petitions as to the shipment of the barley in question and the destination thereof. The answers, in effect, merely averred that after the receipt of the cars and contents by the receiver, they were delivered by him, in the due course of business, to the Terminal Railroad Association of St. Louis, and were damaged or destroyed while in the possession of that association and by its negligence.

It was alleged that the delivery to the Terminal Association had been made by virtue of a contract between the receiver and the Terminal Association, of date June 1, 1891, which contract was annexed as a part of the answer; and that by the custom and course of business existing between the receiver and the Terminal Association for four years prior to the deliveries in question, it resulted that the Terminal Association and not the receiver was bound for the damage which the fire had brought about. The receiver, moreover, filed a cross petition praying that the Terminal Association be made a party defendant to the intervention proceedings, so that its liability to the intervenors might be decreed. Upon this application the court issued a rule upon the association to show cause why it should not be made a party defendant as prayed. To this action, the Terminal Association appeared, solely for the purpose of objecting to the jurisdiction, and moved to discharge the rule for various reasons, all of which addressed themselves to the want of power to compel the appearance of the Terminal Association as a defendant to the interventions. The cross petition, rule and the motion just referred to were not thereafter pressed upon the attention of the court, and the Terminal Association never appeared as a party to the intervention proceedings.

When the issues on the interventions were thus made up, the court referred the claims of all the intervenors to a master to take testimony and report. Under this reference the testimony as to all the interventions was taken together. During the course of the taking of the testimony before the master, it having developed that the propinquity of a warehouse filled with hay was the proximate cause of the fire, the intervenors added to their petitions the following allegations, as "a further, separate and distinct ground of recovery therein," viz:

"That upon the arrival of the cars mentioned and described in said petition at said East St. Louis, and while the same were still in the possession of said receiver, said receiver negligently caused and permitted them, together with their contents, to be placed upon certain tracks in close proximity to a large wooden warehouse filled with baled and loose hay, and through which said warehouse locomotive engines were frequently passing and repassing during all hours, night and day; that said wooden warehouse was open at the sides and ends, and had railroad tracks passing

through it, over which locomotive engines frequently passed, and said hay was generally exposed to fire escaping from said locomotives; that said warehouse and hay was easily ignitible, and on account of the inflammable condition of said hay, the large quantity thereof, and the dimensions of said wooden warehouse, the same, if set on fire, would burn with great rapidity and produce a great conflagration, all of which the receiver well knew, yet notwithstanding all this he negligently and carelessly caused and permitted said cars and their contents to be placed upon said side track, near said warehouse, and to remain thereon for several days, when said hay and warehouse were in some manner set fire to, and the same burned so rapidly, and produced such a large conflagration, that said cars and their contents were damaged and destroyed, as stated in said several petitions, and the petitioners damaged in the manner and to the extent and amount, as therein stated."

Prior to the filing of the amended petitions of the intervenors as above stated, the testimony before the master had shown that there was keen competition for the carriage of barley and other commodities from points in Iowa, Wisconsin and Minnesota, between roads entering St. Louis from the west side of the river and those which carried freight from the territory named into St. Louis *via* bridge or ferry connections from East St. Louis. Indeed, it was shown that in order to get a proportion of the business the roads on the East St. Louis side of the river were obliged to furnish dealers with facilities equal to those which could be obtained from roads entering St. Louis on the west side. For this purpose a joint through rate to St. Louis for barley was made, and on the arrival of the barley at East St. Louis, unless the consignees had previously directed to the contrary, instead of being immediately transferred across the Mississippi River for delivery to the consignees in St. Louis, it was held in the cars at East St. Louis to enable the consignees to dispose of the same in carload lots; and when so disposed of the cars were either delivered in St. Louis or transferred for shipment elsewhere, as might be ordered by the consignees. To such an extent did this custom prevail that it was testified that East St. Louis had become the market place for barley consigned from the territory named to St. Louis.

On the hearing before the master, after the testimony on the subject just stated had been introduced, an offer of proof and stipulation respecting same was made, to which we shall now call attention. In presenting a motion for a continuance of the hearing, on the ground that he had been unable to procure the attendance of Mr. Teichman and other commission merchants of St. Louis, counsel for the receiver said:

"We expect to prove by these witnesses that the St. Louis Terminal Railroad Association personally solicited this particular barley business, originating on the Chicago, Milwaukee and St. Paul road, on which this controversy is pending; that these solicitations by the Terminal Railroad Association were made to all the barley dealers in St. Louis, to whom the particular consignments of barley are made, which are now in litigation;

that the Terminal Railroad Association, as an inducement to barley dealers and shippers, agreed to hold the cars on their tracks at East St. Louis free of car service, and offered other facilities in and about their yards at East St. Louis, by which the St. Louis Terminal Railroad Association succeeded in securing the business of all of the shippers; by that term, I mean the consignees and shippers except the business of the John Wall Commission Company, whose business was being handled by the Wiggins Ferry Company, a competing line with the St. Louis Terminal Railroad Association, and that at a later day they also secured the business of this last-named firm. And that the solicitation was made in the interest of the Terminal Railroad Association for the express purpose of having the business sent down the east side of the Mississippi River, so as to give them the benefit of the transfer across the river from East St. Louis to St. Louis, in competition with lines west of the Mississippi River."

In the record is next set out the following statements of counsel for the intervenors:

Counsel for intervenors: . . . "Now in reference to the testimony of people at St. Louis, in respect to the arrangement made by the Terminal Railroad Association, by which it would hold these cars of barley and so forth, rather than to postpone this hearing at this time I will consent that the witnesses, if here, would testify as Mr. Wilson has stated. So I do not think a continuance should be granted on that application.

* * * * * *

"To expedite matters, it is stipulated that the witnesses Otto Teichman, Henry Grieve of the John Wall Commission Company, L. Leinke and Charles Orthwein, at St. Louis, if present, would testify substantially as has been stated by Mr. Wilson."

Leave having been granted the receiver to answer the amended petitions, he met the new averments respecting the warehouse contained in the amended petitions, by denying that, while in the possession of the receiver, the latter negligently caused or permitted the property in question to be placed in proximity to the warehouse referred to in the amended petitions, and further averred that after the delivery of the cars to the Terminal Association the receiver no longer controlled and directed the placing of the cars in the yards of the Terminal Association. It was also denied that the receiver had any knowledge of the dangerous character of the warehouse.

So also in the amended answers, doubtless to be able to avail himself of what was deemed to be a defense arising from the testimony as to the custom of detaining shipments of barley, the offer of proof and the stipulation above referred to, the receiver set up a new defense, stated in his answers as follows:

"This receiver, further answering, avers that all of the said intervening petitioners had knowledge, through their consignees, of the condition of affairs that existed in the yards of the said railroad association prior to and at the time said cars and contents were damaged and destroyed.

"This receiver, further answering, avers that the cars and contents mentioned in the said intervening petitions after being placed remained in close

proximity to said wooden warehouse until the same were damaged and destroyed, with the full knowledge, approval and consent of the said intervening petitioners, through their agents, their respective consignees; and in fact thus remained for the convenience of said consignees, and at their risk."

In the meanwhile, as by the proof which had been already introduced before the master, it was shown that the relations between the Terminal Association and the receiver, at the time of the fire, were not controlled by the contract of 1891, which the receiver had annexed to his answer, but were governed by a contract made on August 1, 1892, which had been produced on the hearing before the master, the receiver, in his amended answer, admitted in effect the error of the averment of his original answer, and conceded that the controversy, in so far as controlled by the contract, depended upon the one made in 1892.

After the conclusion of the testimony the master, in a careful opinion reviewing the law and the facts, reported substantially in favor of the claims of all the intervenors. The testimony which had been taken as to all the interventions was embodied in but one report, that upon the intervention of Jacob Rau, and was referred to in the reports filed upon the other claims.

After hearing on exceptions filed by the receiver to the reports of the master, the court overruled the exceptions, affirmed the reports and decreed the liability of the receiver to the intervenors. An appeal was taken to the Circuit Court of Appeals for the Seventh Circuit, not only by the receiver, but, by leave of the court, the Chicago, Peoria and St. Louis Railroad Company—which had become the owners of the Peoria Railway, as assignees of the purchaser at a foreclosure sale—also perfected an appeal. In the Circuit Court of Appeals the decrees of the Circuit Court as to all but one of the intervenors were reversed. The appellate court, however, was divided in opinion as to the reasons for its action in the cases which were reversed, such division of opinion being upon the deductions to be drawn from the evidence, one judge concluding that the Circuit Court erred upon grounds stated in his opinion, while another member of the court, who concurred in the conclusion that the court below had erred, assigned different reasons. A third member of the court dissented because he thought the court below had deduced proper inferences from the proof in the cause. (56 U. S. App. 274; 87 Fed. Rep. 72.) Thereupon a writ of certiorari was granted by this court.

Mr. Justice WHITE, after making the foregoing statement, delivered the opinion of the Court.

A solution of the issues which arise on this record involves only an analysis of the facts for the purpose of ascertaining the true inferences to be drawn therefrom. In the statement of the case which we have just

made we have given an outline of the origin of the controversy and have referred to the facts only so far as essential to elucidate the pleadings. We propose now to review the facts upon which the controversy turns. The testimony to which we shall refer in doing so is contained in the record of the case of Jacob Rau, number 13 of this term, as in taking the appeals, following the course adopted by the master in making his report, the testimony as to all the interventions was brought up in that case only, and as found in that record has been treated in the argument as applicable to all the interventions.

The Terminal Railroad Association of St. Louis, which will be hereafter, for brevity, styled the Terminal Association, possessed in the city of East St. Louis extensive tracks, yards and facilities for the purpose of successfully carrying on the railroad traffic which came to that point. It was connected with and operated lines of railroad running across two bridges, leading to St. Louis, Missouri, and had many transfer tracks in its railroad yards, which were connected not only with its St. Louis tracks, but with the lines of various railroads which reached East St. Louis from different points. The Terminal Association, therefore, controlled the transfer of railroad business arriving at East St. Louis for St. Louis, and from St. Louis to East St. Louis, thence to other points, except to the extent that both of these classes of business were competed for by the Wiggins Ferry Company, a corporation owning and operating a transfer ferry between East St. Louis and St. Louis, which latter company also possessed terminal facilities in East St. Louis.

The Chicago, Peoria and St. Louis Railway, which we shall hereafter for brevity refer to as the Peoria Company, even when considering the acts of the receiver of that company, operated a line of railroad between Peoria, Illinois, and East St. Louis, in the same State. It commenced business at East St. Louis about January, 1891. The terminus of its main tracks to the latter place was at a point termed Bridge Junction, at a street known as Stockyards Avenue, which was either beyond the city limits, or, if within the city limits, was on the outskirts thereof. At the point where the track of the Peoria Company thus terminated, that road possessed no terminal facilities of any kind for the handling of its freight business. It had no warehouses, no side tracks, no switch engines and no conveniences for the switching or handling of its freight trains. The road therefore was in a position where it was practically impossible for it to handle freight destined for East St. Louis or for carriage beyond that point, and in order to enable it to discharge its duty as a common carrier as to any such business it was absolutely necessary for it to make some arrangement for that purpose. It is true that the Peoria Company had a small freight house on the river front, with one or more side tracks adjacent thereto, which were utilized for the loading and unloading of local

freight. But neither this freight house or the tracks in question were directly connected with the main tracks of the road. To make such connection it was essential therefore for the Peoria Company to use the tracks of some other railroad.

The Peoria Company thus being substantially without any terminal facilities whatever for freight business at East St. Louis, that company as early as June 1, 1891, entered into an agreement with the Terminal Association to supply such deficiency. In August, 1892, the agreement made in 1891 was modified, and governed the relations of the parties when the fire took place. A copy of this agreement is in the margin.*

Under this agreement, the incoming freight trains arriving at the terminus of the main track of the Peoria road as above stated were handled substantially as follows:

The Peoria train was stopped on a Y track. There the Peoria engine was detached and was placed on a stub track reserved for the purpose. A switch engine of the Terminal Association then took hold, broke up the train and distributed the cars on the tracks set apart for the Peoria Company under the agreement.

The evidence shows that the place assigned for the use of the Peoria Company by the Terminal Association, in compliance with the contract,

---

*Memorandum of an agreement, made this first day of August, A. D. 1892, by and between the Terminal Railroad Association of St. Louis, party of the first part, and the Chicago, Peoria and St. Louis Railway Company, party of the second part, witnesseth:

That whereas, the party of the first part undertakes to give the party of the second part terminal facilities at East St. Louis, Illinois, for the handling of its trains, care of its engines and cars, and the handling and care of its freight, under the following terms and conditions:

First. It is agreed that the party of the first part shall furnish the necessary yard room and track facilities in their yards in East St. Louis, Illinois, as now located, and the necessary switch engines and yardmen to do the switching of the party of the second part, in the making up and breaking up of all freight trains that depart from and arrive at East St. Louis, and to furnish storage room for a reasonable number of cars necessary to properly take care of and handle the business of the party of the second part, not exceeding one hundred and fifty (150) cars at any one time; and the charge for the facilities and the work above named shall be at the rate of fifty cents (50) per loaded car in and out, except cars on which the party of the first part receives a bridge toll, which will be handled free; empty cars in and out free.

Second. Cars made "bad order" by and during the making up and breaking up of trains of the party of the second part to be repaired by the party of the second part, and the party of the second part shall furnish its own car inspectors.

All cars made "bad order" outside of the yards set aside for the use of the party of the second part shall be repaired by the party causing the damage.

Third. For all loads to and from the National stock yards the party of the second part is to pay the party of the first part one (1) dollar per car in and out, inclusive

was a particular portion of the yard of the latter corporation, viz., eleven tracks, numbered from 40 to 50, and that these tracks were commonly used for such purpose. This latter fact was expressly admitted by the receiver in a stipulation made during the taking of testimony before the master on the interventions, in subdivision numbered 2 of which it was agreed that the cars and other property were damaged by the fire in question "while on the tracks of the Terminal Railroad Association of St. Louis in its yard at East St. Louis, *commonly used by the receiver herein under the agreement between said association and the Chicago, Peoria and St. Louis Railway Company, dated August* 1, 1892." Though the stipulation referred to was amended in January, 1896, on motion of the receiver, by the elimination of certain admissions contained therein, which it was asserted had been discovered to be incorrect, no attempt was made to seek a correction of the stipulation so far as respected the use of the deposit tracks.

Besides the freight trains coming into East St. Louis from the main track of the Peoria road, as above stated, there were brought to the aforesaid deposit tracks the empty as well as the loaded cars of the Peoria road, coming from the freight house above referred to, and also the loaded or empty cars destined for the Peoria Company from other points and coming into

---

of the charge for making up and breaking up of trains, but not the trackage charge at National stock yards.

Fourth. All cars consigned to and from the East St. Louis freight house of the party of the second part to be switched to and from the Wiggins transfer tracks without extra charge. Regular switching charges and rules to apply on all other cars to and from connections, the party of the first part to be governed in making its collections by instructions shown on billing to it as to who should pay. In the absence of any instructions, the switching charges will follow the car.

Fifth. The party of the first part to furnish track room upon which the engines of the party of the second part can be switched and cared for and turned, as may be required; the care of such engines to be under the supervision of the party of the first part; the price for the service rendered to be agreed upon by the master mechanic of the party of the first part and the superintendent of motive power and machinery of the party of the second part.

This contract to be in force from and after the 1st day of August, 1892, and to continue for six months from that date, and to be renewed from time to time, as desired, at the expiration thereof, if satisfactory to both parties.

In witness whereof, the parties hereto have caused the same to be executed in duplicate this — day of ——, A. D. 1892.

TERMINAL RAILROAD ASSOCIATION OF ST. LOUIS,
By J. O. VAN WINKLER, *General Superintendent.*

Attest: —— ——, *Secretary.*

CHICAGO, PEORIA AND ST. LOUIS RAILWAY COMPANY,
By W. S. HOOK, *President.*

Attest: MARCUS HOOK, *Secretary.*

East St. Louis over any other road connecting with the Terminal Association. On the tracks to which all these cars were taken substantially, therefore, all the freight business of the Peoria Company, whether it arose from dealings with the Terminal Association or with any other railroad corporation, was carried on, and there all the outgoing freight trains of the Peoria Company were made up. It followed also that the freight cars of the Peoria Company, whether inbound or outbound, whether destined to be carried to some ultimate point by the Terminal Association or intended for delivery by that association if carried over other roads, remained upon the tracks set apart in the yard of the Peoria Company until all such purposes could be accomplished. In other words, under the agreement, all the ingoing and outgoing terminal freight business of the Peoria Company was in effect ultimately handled by the Terminal Association, and the yard in question, as far as set apart, was necessarily a yard for the transaction of every variety of the freight business of the Peoria Company.

The tracks thus set apart under the agreement—that is, tracks numbered from 40 to 50—were capable of holding two hundred cars, whilst under the contract the Peoria road was entitled to storage room for but one hundred and fifty cars. The evidence disclosed that the Terminal Association, whenever it found it convenient to do so, utilized the surplus space for the deposit of cars not belonging to the Peoria Company. The receiver of the Peoria road and his employees (such as the local agent at East St. Louis and his assistants, car inspectors, car repairers, &c.) had access to the deposit tracks. A car used as a work shop by the car repairers of the Peoria Company was placed near to said tracks. The consignees had also ready access to the cars placed on such tracks. Over a portion of the deposit tracks—that is, numbers 42 and 43—passed a structure known as the transfer warehouse, a building some six hundred feet in length. On the night of the fire and some time prior thereto, this transfer warehouse was being used by a St. Louis corporation, under leave of the Terminal Association, for the storage of loose and baled hay.

Such being the relations between the Peoria Company and the Terminal Association, we are brought to consider the particular shipments which give rise to the controversy in this case.

In September and October, 1894, by three distinct transactions evidenced by telegrams and letters, the Huntting Elevator Company, of McGregor, Iowa, sold to the Teichman Commission Company, of St. Louis, a large quantity of barley. Respecting the first purchase, the commission company, on September 15, 1894, wrote from St. Louis to the Huntting Company: "We have your telegram accepting our bid of 56 c. net for 25,000 bushels sample barley, *to be shipped to us here via East St. Louis.*" Five days later the Huntting Company telegraphed to the commission

company as follows: "We have yours of the 19th; please wire us best offer on 10,000 or 20,000 of our No. 3 sample barley *delivered St. Louis.*" On November 1, 1894, the commission company telegraphed: "Sold twenty thousand No. 3 fifty-four net *via East St. Louis,*" and confirmed the telegram by a letter which read in part as follows: "We wired you sale to-day of 20,000 bus. your No. 3 barley at 54 c. *net here,* to be shipped *via* East St. Louis." The third sale was effected on October 10, 1894, in the following manner: After a telegraphic offer of "fifty-five net five thousand McNalley sample" had been declined, the commission company telegraphed, "Bid fifty-six net, leaving small margin, *shipment via East St. Louis.*" The Huntting Company replied: "Accept five thousand Lime Spring barley." The barley was delivered to the Chicago, Milwaukee and St. Paul Railway Company—three cars at Lime Spring, Iowa, and seven cars at Prairie du Chien, Iowa. The freight was prepaid by the elevator company, and instructions were given to the agent of the Milwaukee company to forward the cars to the commission company at St. Louis, *via* East St. Louis.

At the time of the shipment in question no receipts were issued by the initial carrier to the shipper for the cars of barley so delivered. It is shown however that it was the invariable custom of the agent of the railway company to fill out the blanks contained in a printed form of way bill, the pertinent portion of which form is inserted in the margin.*

A completed way bill accompanied each car, and in the case of barley consigned to a commission company in St. Louis, it would be recited that the car was "from" the named place of shipment "to East St. Louis," while in the column headed "Consignee and Destination" would be inserted the name of the consignee and the address "St. Louis, Missouri." And the testimony leaves no doubt that a way bill conformably to the course of business referred to accompanied each particular car of the shipments now under consideration.

The cars containing the barley in question were carried to Rock Island, and there delivered with the way bill to the Rock Island and Peoria Railroad Company. The latter road conveyed the cars to Peoria, and delivered them with the way bills to the Peoria and Pekin Union Railroad

---

* *Portion of Way Bill.*

Form 287¼.

CHICAGO, MILWAUKEE AND ST. PAUL RAILWAY.

Car No. Special Way Bill. Way Bill No.

Whose Car, from to Date 189

This form must be used in all cases in billing Flour or Produce made from Wheat milled "in transit."

Consignor.	Consignee and Destination.	No. of Pkgs.	Description of Articles.	Weight.	Rate.	Local Unpaid.	Adv. Charges.

Company, a switching association, which delivered the cars and way bill to the Peoria Company. They were thence carried by the Peoria Company to the end of its main track, and were there put upon a Y track and carried to the place of deposit under the agreement as above stated.

The trains containing the cars of barley in controversy reached the end of the Peoria main track, and the cars in question were taken by the switch engine of the Terminal Association to the deposit tracks at the times following: 3 cars at 5 P. M., on Wednesday, October 24, 1894; 4 cars, (2 at 4 A. M., 1 at 1.45 P. M. and 1 at 8 P. M., respectively,) on Thursday, October 25, 1894; 1 car at 2.45 A. M., on Friday, October 26, 1894; and two cars at 1.45 P. M., on Sunday, October 28, 1894, (the day of the fire.)

It is shown beyond dispute that when the train in which these cars were found was taken by the Terminal Association on the Y track to be conveyed to the customary place of deposit, the way bills which accompanied the cars were retained by the Peoria Company, and were not delivered to the Terminal Association.

On the evening of October 28, 1894, there were many cars of the Peoria Company standing on the tracks set apart for its use as above stated, among them those of the present intervenors which had been delivered at the dates previously mentioned. The general character of the cars of the Peoria Company which were in the yard is shown by the fact that on that evening two trains of freight cars outward bound over the line of the Peoria Company were made up and taken by it and carried northward. On the same night, shortly after eleven o'clock, a fire broke out in the southeast corner of the transfer warehouse, extending over a portion of tracks 42 and 43, as above stated. The proof unquestionably establishes that this warehouse, as we have already stated, was filled with hay, loose and in bales; that the warehouse was open at both ends in such a way as to create imminent danger of the igniting of the hay by sparks from passing engines, and that such engines engaged in the work of handling cars were traveling backwards and forwards on the tracks in the vicinity of the warehouse. The dangerous character of the building, as used at the time of the fire, is well stated in the answer of the receiver, as "a veritable fire trap." No reasonable inference can be deduced from the proof other than that the fire was caused by the igniting of the hay from the sparks of a passing locomotive. That the perilous condition of the warehouse was known to the Terminal Association is beyond controversy, since it was shown that the warehouse was leased by that company to the corporation which had stored the hay therein, for the purpose of doing so. That knowledge of the hazardous use made of the building was also known to the Peoria Company is likewise true, as it is shown that the agent of the Peoria Company observed the situation some time before the fire, and that such official called the attention of representatives of the Terminal Association to the insecurity arising therefrom.

The conflagration destroyed eighty-three cars and their contents. Of these, thirteen were admittedly chargeable to the Terminal Association, either because they had been so dealt with by the Terminal Association as to clearly make it responsible for them, or were cars of the Peoria Company, for which that company had delivered way bills to the Terminal Association for the further movement of such cars, whereby they admittedly passed into the control of the Terminal Company.

Of the remaining seventy cars belonging to the Peoria Company one was filled with outbound freight destined over that road; the others were cars which had come in over the track of the Peoria Company at various times, and had been placed in the yard under the circumstances already mentioned.

With the foregoing facts in mind, we pause in order to state the conflicting deductions which the parties claim should be drawn from them. We do this because if what is asserted by each side be accurately defined, it will enable us in our further examination of the facts to restrict our enquiry alone to those matters which are necessarily pertinent.

The contentions of the Peoria Company, in every possible aspect, are embraced in three propositions, viz:

1. That the barley in question was consigned to St. Louis, and therefore the obligation of that company was to carry to the terminus of its line and there deliver to the Terminal Association for the completion of the transit; and that having, prior to the fire, delivered to the Terminal Association at the end of the line of the Peoria road, the responsibility of the latter company to the owners of the merchandise had ceased.

2. That even if the shipment was to East St. Louis only, as the Peoria Company, when the merchandise arrived at the terminus of its road at that point, had delivered the cars to the Terminal Association, that association thereafter held them, not for the account of the Peoria Company, but for the owners, and that this delivery by which the Terminal Association came into possession of the cars for account of the owners, was sanctioned by the custom of trade as to barley shipments, and was moreover shown to have been expressly authorized by the offer of proof and the stipulation in connection therewith, which, as we have shown in the statement of the case, took place on the hearing before the master prior to the time when the amended answer of the Peoria Company to the amended petitions in intervention had been filed.

3. That as by the custom of trade as to barley, it was shown that such merchandise on the completion of the carriage to East St. Louis was there to be held for an uncertain period to wait the convenience of the owners until direction had been by them given for further shipment, it followed that after the arrival of freight at East St. Louis it was there retained by whomsoever it was held, not as a carrier, but for the benefit of the

owners and to aid them in the transaction of their business, as their bailee; and that the Peoria Company was hence not responsible as a carrier under any view, and under the proof was not liable as a warehouseman. In effect, all the contentions of the intervenor rest upon a denial of these propositions.

When the two first propositions above stated are duly weighed, it is seen that although in some respects they contain different elements, in effect they both must rest upon an identical predicate of fact; that is, that the merchandise in question had arrived at East St. Louis and been there delivered to the Terminal Association. This becomes obvious when it is seen that the first proposition asserts a non-liability of the Peoria Company, because as a connecting carrier it had delivered the merchandise to the Terminal Association for further transportation, and that the second proposition rests upon the assertion that on the arrival of the merchandise at East St. Louis it had been delivered to the Terminal Association, which was, under the custom of trade and the offer of proof and stipulation above referred to, the agent or bailee of the owners. The different character in which it is charged that the merchandise was delivered to the Terminal Association, as stated in the two propositions, does not obscure the fact that both propositions essentially depend upon an assumption of fact common to both, that is, the delivery of the merchandise to the Terminal Association on its arrival at East St. Louis.

In order to dispose of the two first propositions we come then to consider whether the cars containing the barley, on their arrival at East St. Louis, were delivered, in the legal import of that word, by the Peoria Company to the Terminal Association; and it is perhaps unnecessary to observe that the consideration of this premise of fact will serve completely to dispose of every argument based upon the custom of trade by which cars were held at East St. Louis, and the assumed agreement of the Terminal Association with barley dealers as embraced in the offer and stipulation made in relation therewith. In its best aspect, the custom of trade was simply that the barley be held at East St. Louis by the company in possession of the same until the consignee gave an order for the completion of the transit. And in any view, the offer of proof and stipulation manifested but an agreement that as to consignments of barley which were solicited, the Terminal Association would conform to the course of dealing, and would, when the barley came under its control and possession, not exact a charge for car service. But neither the course of business nor the assumed agreement of the Terminal Association could possibly subject that association to a liability for merchandise before it came into its possessiou, at a time when it was held for the consignees and subject to their order, by another and different corporation.

This leads us to determine what was the attitude of the respective parties, under the contract, to the freight trains of the Peoria Company

which were taken by the switch engines of the Terminal Association and placed on the deposit tracks, set apart for the former company. The legal relation must depend upon the contract, as it is obvious that the Terminal Association was under no obligation, as a common carrier, to accept in train loads freight arriving over the Peoria road, with cars consigned to different points and over different connections, and to subject itself, as a common carrier, to the hazard of sorting out the cars contained in such trains, and this also without delivery to it of way bills showing the further destination of such cars. It is also equally obvious that under its duty as a common carrier the Terminal Association was under no obligation to allow the use of its yard for all the purposes of the Peoria Company, the handling of its incoming as well as its outgoing freight trains, whether of loaded or empty cars, and the furnishing of all the appliances necessary to do so; and especially to allow a given number of freight cars of the Peoria Company to occupy a designated portion of the yard of the Terminal Association for such time and under such circumstances as the Peoria Company might elect.

Before coming to consider the text of the contract, the circumstances surrounding the parties at the time it was made and the exigencies which caused it to be entered into are rightfully to be borne in mind as means of interpretation if ambiguity exists. We hence recall the facts to which we have previously referred. When the contract was executed, although the Terminal Association possessed extensive terminal facilities at East St. Louis, the Peoria Company had no means whatever for handling the freight business coming in or going out of East St. Louis over its main line. It had neither yards nor switches nor switch engines at East St. Louis, nor any of the appliances or instrumentalities essential to enable it, if it received freight inward or outward bound, to discharge its duty as a common carrier. The purpose of the contract then was to bestow upon the Peoria road the facilities it absolutely required. As the tracks in the yard which the Peoria Company acquired, to carry on its business, were therefore the only terminal facilities which that company had, where its incoming and outgoing freight cars were received, and where all its freight trains were made up, to hold that the yard so far as set aside was not that of the Peoria Company, would be but to say that the Terminal Association and the Peoria Company had been merged into one corporation for the purposes of all the terminal business of the Peoria Company, or that the Terminal Association had become a guarantor to the shippers of freight over the Peoria road for all losses occasioned by the Peoria Company for which it was liable as a common carrier.

We come to a specific examination of the text of the contract.

The preamble which announces the intention of the parties in entering into the contract clearly rebuts the construction that the terminal facilities

which it was agreed should be afforded to the Peoria Company were to be enjoyed by that company without any responsibility whatever resting on it; in other words, that it was to have the facilities which were essential to discharge its duty as a carrier, but that the Terminal Association was to bear all the risk of such enjoyment. This results since the preamble recites that the Terminal Association undertakes "to give the party of the second part," (the Peoria Company,) "terminal facilities at East St. Louis, Illinois, for the handling of its trains, care of its engines and cars, and the handling and care of its freight, under the following terms and conditions." Mark, the purpose is to give the Peoria Company "facilities," not to cause the Terminal Association to become responsible for the Peoria Company, whilst the latter was making use of the facilities given to it. The contract also expresses the purpose thus declared in the preamble—that is, that the facilities are to be furnished to the Peoria Company. The agreement is not that the Terminal Association will store cars for the Peoria Company, but that there is to be given to that company "storage room for a reasonable number of cars necessary to properly take care of and handle the business," (not of the Terminal Association, but) of the Peoria Company. The provision in the second paragraph is that "cars made 'bad order' by and during the making up and breaking up of trains of the party of the second part," (the Peoria Company,) "to be repaired by the party of the second part, and the party of the second part shall furnish its own car inspectors." This makes the meaning yet clearer, since it results that during the making and breaking up of trains all the risk continued to be on the Peoria Company. And this is cogently enforced by the stipulation which immediately follows, that "all cars made 'bad order' *outside of the yards* set aside for the use of the party of the second part *shall be repaired by the party causing the damage.*" That is to say, the contract whilst casting the risk on the Peoria Company during the making and breaking up of its trains, and whilst its cars remained in the yard set apart for the Peoria Company, applied a different rule outside of the yard, when by an order given to the Terminal Association to move the cars for further transit or delivery they actually came under its control. It is to be considered also that the compensation provided in favor of the Terminal Association by the contract is wholly incompatible with the construction that all the cars in the yard set apart for the Peoria Company were from the mere fact of their deposit there to be at the risk of the Terminal Association. Indeed, the fourth article expressly contemplated that the movement by the Terminal Association of the cars from the yard set apart for the Peoria Company should depend on the orders issued by the Peoria Company in the form of way bills, sinces it provides: "The party of the first part" (the Terminal Association) "to be governed in making its collections" (for cars moved) "by *instruction shown on billing to it* as to who should pay."

From this analysis of the contract, it results that the obligations which it imposed were entirely in accord with the conception naturally suggested by the general considerations to which we adverted before approaching the text. For it will be observed that the several provisions of the contract clearly subject the Peoria Company to all the risk resulting from those acts which that company was obliged to perform as a common carrier before it could effect delivery to a connecting carrier, and on the other hand imposed upon the Terminal Association the risk arising after the performance of such acts. That is, as by the contract the Peoria Company was furnished the facilities for the execution of its obligations as a common carrier, it was submitted to the risk incident to the performance by it of its own duties, and the Terminal Association was subjected to the risk which would likely devolve upon it by a delivery by the Peoria Company after the latter had performed its own duty as a common carrier.

The dealings and conduct of the parties in executing the contract dispel all question as to the proper interpretation to be given it. The proof beyond any doubt establishes that the way bills which we have described, and a sample of one of which we have reproduced, accompanied the freight cars from the initial point to the terminus of the Peoria main tracks. When the Peoria train was taken charge of by the switch engine of the Terminal Association in order that it might be broken up and the cars composing the train be placed in the portion of the yard set apart for the Peoria, these way bills were retained by the latter company. While the Terminal Association kept a full record of the cars received on its Y tracks from the Peoria Company, and of the particular track on which each car was ultimately placed, presumably in order that it might readily locate a car when it received orders for further movement, as the way bills were retained by the Peoria the Terminal Company knew officially nothing of the final destination of the cars and as to where they were to be forwarded. It therefore was in a position where it could not move them until it received forwarding instructions or new way bills from the Peoria Company. The proof is that only on receipt of such new instructions or way bills would the Terminal Association card and switch out the cars from the deposit tracks of the Peoria Company, and ultimately deliver them to connections or destinations as ordered by the Peoria. It is established by the evidence, substantially without conflict, that the cars as placed on the tracks in the yard set apart, as above stated, continued to remain there, and were not subject to be moved by the Terminal Association by the orders of the consignee, or any other person, until instructions to do so were given by the Peoria Company. This fact was testified to by the receiver himself and his employees. Thus receiver Bosworth said that when a train of the Peoria Company was broken up by the Terminal Association and the cars put upon the tracks commonly used for the business

of the Peoria Company, the cars were not moved by the Terminal Association until instructions to do so were given by the receiver, and that they were subject to the order of the receiver to that extent, and the Terminal Association would not have recognized any instruction that the consignee would have made directly to it. The local agent at East St. Louis of the Peoria road also testified, respecting shipments of barley consigned to commission merchants whose address would be stated merely as "St. Louis," that "*there are a great many of the cars* we have orders for before they arrive, giving us designated points for delivery." Such cars, however, would be placed on the deposit tracks referred to, until the agent of the Terminal Association had received from the agent of the Peoria road a new way bill or manifest for the freight, indicating the precise destination; while cars of barley consigned as stated, for delivery in St. Louis, for which no orders for further movement were given by the consignees prior to the arrival of the cars, would be allowed to remain on the deposit tracks awaiting instructions to the Peoria Company from the consignee, such freight being, "as a rule, held for the accommodation of the consignee." In substance, this witness further said:

In the case of barley shipments, the time of detention on the deposit tracks would vary from two hours to the same number of months, depending upon whether instructions from the consignees had been received prior to the arrival of the cars, or upon the time, following the deposit of the cars, when the consignee would answer the notice sent to him and direct as to delivery.

Stapleton, the chief clerk of the local agent at East St. Louis of the Peoria road, testified on the subject as follows:

"The cars would come in and be placed on the tracks in the Terminal Association yard wherever they saw fit; we would take the way bill and notify the consignee that we had a car numbered so and so loaded with barley; 'Where do you want it?' That is about the substance of the notice; and at such time as he got ready he would send this notice back, endorsed on the back a great many times, Send this car to Hines' Brewery, or Send it to Highland or some other point. Then we take and make out a way bill; take that to Mr. Felps and take his receipt.

* * * * * *

"With reference to Teichman's barley, we would sometimes have orders in our office, in advance of the arrival of the cars, what disposition to make of them; others we wouldn't. Those we didn't, when they came we sent Mr. Teichman notice that the cars were there, what shall we do with them? Virtually that is the substance; and he would, at his pleasure, advise us to send the car so and so, to Hines' brewery, say. We would make out a way bill for the car, consign it that way, and deliver it to Mr. Felps of the Terminal Association.

* * * * * *

"If a man would say 'Send this to Highland,' that would be instruction to the Vandalia, but the Terminal Association would handle it."

This testimony as to the relations existing between the parties and the necessity for instructions from the Peoria Company or new way bills before the Terminal Association was empowered to remove the cars standing in the designated yard is well illustrated by the proof, which shows that on October 28, 1894, the day of the fire, among the cars belonging to the Peoria Company, standing in said yard, there were twenty-four cars which had been received at various times, and that on that day for these twenty-four cars new way bills had been delivered by the Peoria Company to the Terminal Association and the cars were moved by the latter corporation, and therefore escaped the fire.

In passing, we note how completely this proof refutes the assumption predicated upon the assumed custom of trade, and the offer of proof and stipulation, since it demonstrates that up to the time of the giving of instructions to the Terminal Association no relation between the Terminal Association and the consignees of the barley had arisen, and that the order of the consignees given to the Terminal Association as to the further movement of the barley would have been wholly without effect and worthless, without the giving of an order by the Peoria Company to the Terminal Association on the subject.

In the course of the dealings between the roads a blank form of order for the movement of the cars was prepared by the Terminal Association, was delivered to the Peoria Company, and was used in the dealings for the purpose intended. One of these blanks was filled by an employee of the receiver during the course of the hearing before the master and was put in evidence. A copy will be found in the margin.*

It will be seen that the blank in question plainly manifests that prior to the giving of the order the car referred to in the document had not been transferred to the Terminal Association, since it declares that the transfer to that company arises from the order which the paper contains. Another very conclusive fact is likewise shown beyond dispute. By the course of business followed by the Peoria Company that road, where it received cars from other roads, to be further transported, made to the carrier from whom such cars were received what are denominated "junction reports," that is, statements showing when the cars in question were delivered by the Peoria Company to another carrier, and hence passed from its control. Now these reports thus made, in the course of the business, embraced cars

---

* Car No. 680. Terminal Railroad Association of St. Louis.
C., M. & St. P. Manifest of freight transferred.
From C. P. & St. L. R. R. To Eads R. R. Oct. 10, 1894.

Consignor.	Consignee & destination.	Description.	Weight.	Charges.
C. M. & St. P. - Wykoff.	Teichman Com. Co. 16th St. & Union depot. St. Louis, Mo.	Barley.	30,000.	$51.00

which had been taken and placed in the yard after the Peoria Company had issued the new instructions or way bills to the Terminal Association. Thus for the purpose of its dealings with the carrier from whom the cars were received, the Peoria Company, by its whole course of action, constantly avouched that the cars were in its possession and under its control while in the yard up to the time the order to move was given by it to the Terminal Association, yet the claim now asserted is that the cars had passed from the possession and control of the Peoria Company from the mere fact that they had been placed in the yard and before the order to move was given.

A yet further fact of great significance remains to be noticed. The Peoria Company carried one or more insurance policies upon property in its possession. In an affidavit to proofs of loss furnished by the receiver to the insurance companies, verified by agent Calvert, in December, 1894, it was stated:

"During the night of October 28, 1894, a fire occurred on the track of the Terminal Railway Association Company at East St. Louis, State of Illinois, (*said tracks being used by the Chicago, Peoria and St. Louis Railway Company,*) and burned the cars, and wholly consumed the property freight *in transit* in said cars, as set forth in statements attached hereto, and forming a part of this proof of loss." [Italics ours.]

The statement attached as part of the proofs of loss embraced the property, the value of which was subsequently demanded in the intervention proceedings. The proof of loss, while enumerating the claim of the Chicago, Milwaukee and St. Paul Railway for thirty-eight of its cars, which had been destroyed, however, contained no reference to seventeen of the cars of that company which had been but partially damaged and were repaired by the receiver without any intimation to the Milwaukee Company that the receiver was not legally required to bear such expense, although, as between the Terminal Association and the receiver, the latter claimed that the former was ultimately liable for such damage.

Concluding that at the date of the fire the merchandise in question had not been delivered by the Peoria Company and was in contemplation of law within its possession and control, the two first propositions are disposed of, and it remains only to consider the third, that is, even if the merchandise was in the possession of the Peoria Company at the time of the fire, by the custom of detaining the barley at East St. Louis for further orders, it was there held by the Peoria Company not as a carrier but as bailee, and under such relation the proof does not establish its liability. But the legal aspects of this proposition need not be considered, since it rests upon an assumption of fact which is unfounded, that the proof is insufficient to fix the responsibility of the Peoria Company, even although it merely held the merchandise as a bailee or warehouseman. We have seen that the amended interventions even under the hypothesis

that the Peoria Company did not hold the goods at the time of the fire as a common carrier but as a warehouseman, plainly charged the liability of that company for the destruction of the property because of its negligence in and about the care of the goods. The facts which we have already stated as to the hazardous use of the warehouse and the actual knowledge of the Peoria Company of its condition, clearly sustains this latter ground, of the asserted liability of the Peoria Company. And even although the proof of actual knowledge by the Peoria Company, of the condition of the warehouse, be put out of view and weight be given alone to the relation which that company bore to the tracks set apart for its use, and to its duty under the law to know the condition of the place where it stored the freight held by it, and the negligence which must be implied if no actual knowledge existed of the use made of the warehouse, from the presence of the officers and employees in that locality in the discharge of their duty, yet the liability of the Peoria Company in the capacity of warehouseman was clearly established by the proof.

Incidentally, it seems to be claimed in argument that the Huntting Elevator Company was not entitled to assert a right of recovery, because it was not the real party in interest. But we need not dwell upon this claim, as it depends upon the contention that the facts established a delivery of the merchandise to the consignees, a contention which has been fully disposed of by what has been previously said. And even if under the custom of trade by which the barley was retained by the Peoria Company at East St. Louis, it resulted that the Peoria Company became a bailee or warehouseman for the consignees, under such hypothesis the right of the Huntting Elevator Company to recover in the intervention proceedings is manifest. The proof shows that after the destruction of the barley by the fire in question, upon the demand of the consignees, the Huntting Elevator Company, in order to comply with its contracts of sale, replaced the damaged or destroyed barley. Under this state of facts, therefore, the Huntting Elevator Company became in effect the assignees of the consignees in respect to any claim which the latter might have asserted. Of course, nothing which we have said in the foregoing opinion or anything which will be contained in the decree which we shall render will preclude any right which may exist or be asserted by the Peoria Company against the Terminal Association for the loss occasioned by the fire in question.

The decree of the Circuit Court of Appeals is reversed, and the decree of the Circuit Court of the United States for the Southern District of Illinois is affirmed.

Mr. Justice BREWER did not hear the argument, and took no part in the decision of this cause.

1730

TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1903.

No. 14,643

JACOB RAU, PETITIONER,

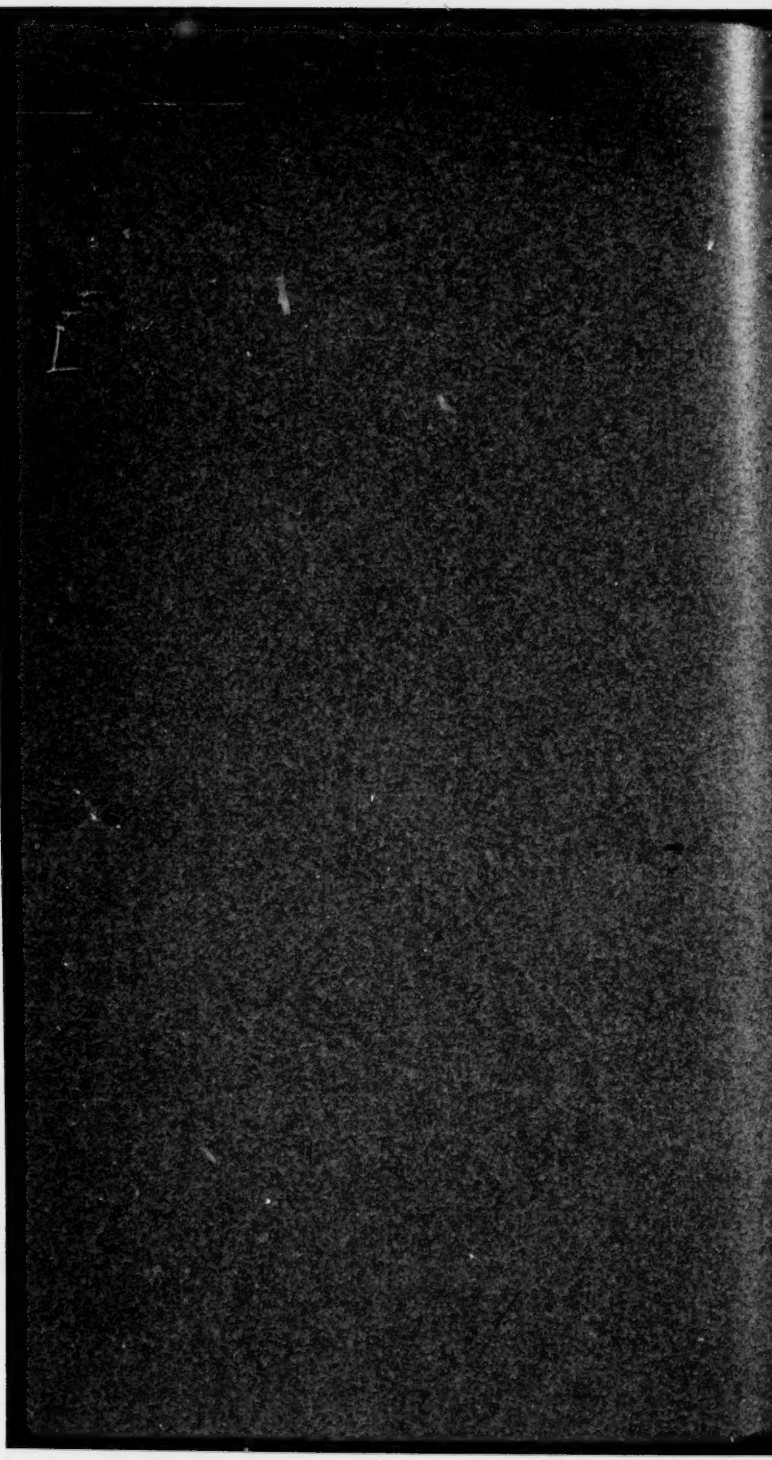
vs.

C. H. BOSWORTH, RECEIVER OF THE CHICAGO, PEORIA AND ST. LOUIS RAILWAY COMPANY, AND THE CHICAGO, PEORIA AND ST. LOUIS RAILWAY COMPANY.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

PETITION FOR CERTIORARI FILED APRIL 20, 1903.
CERTIORARI AND RETURN FILED MAY 18, 1903.

(16,858.)



(16,858.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1898.

No. 285.

JACOB RAU, PETITIONER,

vs.

C. H. BOSWORTH, RECEIVER OF THE CHICAGO, PEORIA AND ST. LOUIS RAILWAY COMPANY, AND THE CHICAGO, PEORIA AND ST. LOUIS RAILWAY COMPANY.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

INDEX.

	Original.	Print.
Caption	*a*	1
Transcript from the circuit court of the United States for the southern district of Illinois	*b*	1
Caption	*b*	1
Placita	1	1
Bill of complaint of Mercantile Trust Company	2	2
Exhibit A—Mortgage, March 1, 1888	9	8
Order appointing receiver	20	17
Intervening petition of Jacob Rau	24	20
Answer of receiver to intervening petition	27	22
Exhibit to answer—Agreement of June 1, 1891	29	24
Cross-petition of receiver	31	26
Rule on Terminal Railroad Association of St. Louis to show cause why it should not be made a party	33	28
Motion of Terminal Railroad Association	34	29
Stipulation of parties as to making proof	36	31

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., SEPTEMBER 15, 1898.

	Original.	Print.
Exhibit B—Receipt of C., M. & St. P. R'y Co. for property shipped	40	35
C—Receipt of C., M. & St. P. R'y Co. for property shipped	41	36
D—Receipt of C., M. & St. P. R'y Co. for property shipped	42	37
E—Receipt of C., M. & St. P. R'y Co. for property shipped	43	38
A—Receipt of C., M. & St. P. R'y Co. for property shipped	44	39
Notice to file replication	45	41
Replication	46	41
Leave to petitioners to amend petitions	46	42
Amended answer of receiver	47	43
Replication to amended answer of receiver	49	45
Notice and motion of receiver for leave to amend stipulation	50	46
Affidavit in support of motion to amend stipulation	53	48
Order granting leave to amend stipulation	54	49
Notice and affidavit in support of motion to amend petitions	55	50
Amendment to petitions	57	52
Report of master in chancery	58	53
Exhibit to report of master—McMichael report	60	55
Exceptions of receiver to report of master	70	64
Order overruling exceptions and approving report	73	66
Decree, April 5, 1897	73	67
Certificate of evidence	75	68
Testimony of F. X. Roederer	75	69
George F. Phelps	81	73
W. H. Calvert	96	89
W. E. Beacham	98	89
George H. Phelps (recalled)	105	95
W. E. Beacham (recalled)	106	96
George H. Phelps (recalled)	107	96
A. M. Gregory	109	98
Exhibit A—Agreement between Terminal Railroad Association of St. Louis and the Chicago, Peoria and St. Louis Railway Company, August 1, 1892	111	100
B—Drawing of railroad tracks at East St. Louis	113	101
C—Statement of arrival and delivery of cars	114	102
D—Stipulation of parties as to making proof, with exhibits thereto	114	103
Exhibit B—Receipt of C., M. & St. P. R'y Co. for property shipped	119	107
C—Receipt of C., M. & St. P. R'y Co. for property shipped	120	108
D—Receipt of C., M. & St. P. R'y Co. for property shipped	121	109
E—Receipt of C., M. & St. P. R'y Co. for property shipped	122	110
A—Receipt of C., M. & St. P. R'y Co. for property shipped	123	111
Motion to amend stipulation	124	113

	Original.	Print.
Affidavit of Bluford Wilson	127	115
Order amending stipulation	128	116
Exhibit E—Report of C., M. & St. P. R'y as to cars delivered	128	117
F—Cars damaged and burnt by fire at East St. Louis	129	117
G—Junction reports of the C., P. & St. L. R'y	131	119
H—Letter of W. J. Hemphill to J. N. Barr, November 15, 1894	135	123
I—List of cars destroyed in East St. Louis	135	123
K—Letter of J. N. Barr to W. J. Hemphill, November 19, 1894	136	124
Statement of cars destroyed on Jacksonville Southeastern line in fire at East St. Louis, October 28, 1894	137	125
Testimony of Burton Hanson	140	127
W. E. Beacham (recalled)	141	128
George W. Phelps (recalled)	145	132
A. M. Gregory (recalled)	152	137
W. E. Beacham (recalled)	153	138
W. R. Bradley	154	139
Exhibit L—Manifest of freight transferred	155	140
M—Waybills Nos. 379, 378, 483, 507	156	141
N—Waybill No. 80	160	145
Form of waybill	160½	145
Station receipts	161	146
Exhibit O—Waybills, &c	162	149
P—Waybill No. 307	167	154
Q—Waybills, &c	169	156
R—Waybill No. 56	171	158
S—Station receipt	173	159
T—Form of Terminal railroad receipt	175	162
U—Terminal railroad receipt	175	162
V—Terminal railroad receipt	175	162
W—Notice to receiver to produce before the master in chancery statement of W. H. Calvert	175	163
Statement of cars and their contents burned at East St. Louis during the night of October 28, 1894, and the market value of freight in said cars at the time they were burned	177	165
Exhibit 1—Letter from Burton Hanson to Bluford Wilson, March 22, 1895	182	170
2—Letter from Burton Hanson to Philip B. Warren, May 10, 1895	183	170
Testimony of Mark Shawhan	184	172
David Lester	188	175
E. R. Stapleton	191	177
John Wiedmer	209	193
B. D. Kane	213	197
S. S. Bennett	219	203
W. H. Calvert (recalled)	223	206
C. H. Bosworth	238	219
Bluford Wilson	251	230
W. H. Calvert (recalled)	252	231

	Original.	Print.
Exhibit 3—Drawing, location of fire at East St. Louis	257	236
4—Letter from J. Ramsey, Jr., to C. H. Bosworth, November 6, 1894	258	236
5—Letter from J. Ramsey, Jr., to C. H. Bosworth, February 7, 1885	258	236
6—Date of arrival of cars	259	237
Statement by Mr. Wilson, &c	260	238
Testimony of George W. Phelps (recalled)	263	242
Aug. A. Poland	265	243
W. H. Calvert (recalled)	267	244
Exhibits—Blank forms of waybills, &c	268	246
Testimony of E. J. Tull	275	255
S. Y. Hyde	283	262
J. C. Heitbahn	288	266
Exhibit A—Blank shipping bill	289	268
B—Blank shipping form of W. W. Cargill Company	290	268
C—Blank shipping form of S. Y. Hyde Elevator Company	290	268
D—Joint tariff	291	269
Telegram, Wilson and Warren to Hanson, January 28, 1896	303	281
Letter, Warren to Hanson, January 27, 1896	303	281
Stipulation of parties as to taking testimony	304	282
Stipulation of parties as to taking testimony	305	283
Testimony of James N. Gilchrist	306	283
Jacob Rau	314	290
J. H. Ellsworth	318	294
Henry Rippe	327	30[illegible]
Rippe Exhibit A—Letter, William D. Orthwein Grain Company to Rippe, September 19, 1894	332	306
B—Letter, William D. Orthwein Grain Company to Rippe, October 10, 1894	332	306
C—Letter, W. E. Orthwein to Rippe, October 15, 1894	332	307
D—Letter, William D. Orthwein Grain Company to Rippe, October 20, 1894	333	307
E—Letter, William D. Orthwein Grain Company to Rippe, October 23, 1894	333	307
F—Letter, Rippe to William D. Orthwein Grain Company, October 11, 1894	333	308
G—Letter, William D. Orthwein Grain Company to Rippe, October 26, 1894	334	308
Testimony of S. Y. Hyde	334	308
Statement made by Mr. Hyde	337	311
Testimony of W. W. Cargill	338	312
William McMichael	343	316
Stipulation of parties and letters and telegrams to be filed with deposition of S. Y. Hyde	352	324
Judge's certificate to evidence	357	328
Petition of receiver for appeal	357	328
Assignment of errors by receiver	358	329

	Original.	Print
Bond on appeal by C. H. Bosworth, receiver	359	330
Order allowing C. H. Bosworth, receiver, an appeal and approving bond	360	331
Petition of the Chicago, Peoria and St. Louis Railroad Company to be made party and for leave to appeal	360	331
Assignment of errors by the Chicago, Peoria and St. Louis Railroad Company	362	332
Bond on appeal of the Chicago, Peoria and St. Louis Railroad Company	363	333
Order making Chicago, Peoria and St. Louis Railroad Company party defendant, allowing appeal, and approving bond	364	334
Clerk's certificate to transcript	364	335
Copy of order of circuit court of June 26, 1897	366	336
Copy of order of circuit court of July 21, 1897	367	336
Appearance of appellee	368	337
Appearance of appellant	369	337
Order placing case on calendar	371	338
Order setting case for hearing	372	339
Hearing and submission	373	339
Opinion	374	340
Decree	405	365
Order staying mandate	406	365
Petition for rehearing	407	366
Order overruling petition for rehearing	408	367
Clerk's certificate to transcript	409	367
Writ of certiorari	411	368
Return to writ of certiorari	413	368
Stipulation as to return	415	369

a *Transcript of Record.*

In the United States Circuit Court of Appeals for the Seventh Circuit, October Term, A. D. 1896.

MERCANTILE TRUST COMPANY
vs.
CHICAGO, PEORIA & ST. LOUIS RAILWAY COMPANY ET AL. } No. 452.

In the matter of the intervening petition of Jacob Rau.

C. H. BOSWORTH, Receiver, etc., Appellant,
vs.
JACOB RAU, Appellee.

Mr. Bluford Wilson, Mr. Philip B. Warren, counsel for appellant; Mr. George R. Peck, Mr. Burton Hanson, Mr. George P. Carey, counsel for appellee.

Transcript of record filed September 13, 1897.
Printed record filed Sep. 22, 1897.

OLIVER T. MORTON, *Clerk.*

b In the Circuit Court of the United States for the Southern District of Illinois. In Chancery.

MERCANTILE TRUST COMPANY
vs.
CHICAGO, PEORIA & ST. LOUIS RAILWAY COMPANY *et al.* } Consolidated Cause.

In the matter of the intervening petition of Jacob Rau.

1 *Pleas.*

Pleas in the circuit court of the United States of America for the southern district of Illinois, held at the city of Springfield, in said district, before the Hon. William J. Allen, district judge of said district, and in the absence of the Honorable William A. Woods, the Honorable James G. Jenkins, and the Honorable John W. Showalter, judges of the seventh judicial circuit, on the fifth day of April, in the January term of said court, in the year of our Lord one thousand eight hundred and ninety-seven, and of our Independence the one hundred and twenty-first year.

MERCANTILE TRUST COMPANY
vs.
CHICAGO, PEORIA AND ST. LOUIS RAILWAY COMPANY *et al.* } In Chancery. Consolidated Cause.

In the matter of the intervening petition of Jacob Rau, filed January 26, 1895.

Be it remembered, that heretofore, to wit: on the twenty-first day of September, in the year of our Lord one thousand eight hundred

and ninety-three, came the Mercantile Trust Company of the State of New York, by Messrs. Alexander & Green, its solicitors, and filed in the office of the clerk of the circuit court of the United States for the southern district of Illinois, its bill for foreclosure of mortgage and appointment of receiver, together with the mortgage sought to be foreclosed, in cause of Mercantile Trust Company of New York against The Chicago, Peoria and St. Louis Railway Company, which said bill and mortgage are as follows, to wit:

2 *Bill of Complaint. Filed Sept.* 21, 1893.

In the Circuit Court of the United States for the Southern District of Illinois, in the Seventh Circuit. (In Equity.)

To the honorable judges of the circuit court of the United States for the southern district of Illinois for the seventh circuit, sitting in equity:

The Mercantile Trust Company, a corporation created by and existing under the laws of the State of New York, brings this, its bill of complaint, against the Chicago, Peoria and St. Louis Railway Company, a corporation created and existing under and by virtue of the laws of the State of Illinois, as hereinafter set forth.

I. And thereupon your orator complains and says that the Mercantile Trust Company is a corporation created by and existing under the laws of the State of New York, and having its principal office for the transaction of its business in the city of New York, in said State of New York, and is a citizen of said State of New York within the meaning of the laws fixing and determining the jurisdiction of this honorable court.

II. And your orator further shows upon its information and belief that on and prior to the first day of March, 1888, there existed a railroad corporation known as the Chicago, Peoria & St. Louis Railway Company, duly created by and existing under and by virtue of the laws of the State of Illinois, and possessed of and endowed with powers, rights, privileges, franchises and immunities granted by the laws of said State, and was and is a citizen of the said State of Illinois, within the meaning of the laws fixing and determining the jurisdiction of this honorable court, and was at all times duly authorized by law to construct, lease, purchase and operate a railway beginning in the city of Pekin, in the county of Tazewell, and terminating in the city of Jacksonville, in the county of Morgan, with a branch railway beginning in the city of Havana, in the county of Mason, and terminating in the city of Springfield, in the county of Sangamon; all in the said State of Illinois.

III. And your orator further shows unto your honors that heretofore and on or about the first day of March, 1888, the said Chicago, Peoria & St. Louis Railway Company, being thereunto duly authorized, by its president and secretary, and under its seal, made and executed its 1,500 bonds, known as first-mortgage five per cent. gold bonds, numbered consecutively from 1 to 1500 inclusive, each for

the sum of $1,000, bearing date on said first day of March,
3 1888, by the terms of which bonds the said company promised to pay to the bearer of each bond the sum of $1,000 United States gold coin, in the city of New York, on the first day of March, 1928, and also interest thereon at the rate of five per cent. per annum, payable semi-annually, in like gold coin, in the city of New York, upon the presentation and surrender of the coupons annexed to the said bonds, as they severally become due, on the first days of March and September; and that annexed to said bonds were coupons in substantially the following form:

The Chicago, Peoria & St. Louis Railway Company will pay to the bearer, in the city of New York, twenty-five dollars in United States gold coin, on the first day of ——, being six months' interest on bond number —.

—— ——, *Secretary.*

IV. And your orator further shows unto your honor, that on or about the said first day of March, in the year eighteen hundred and eighty-eight, for the purpose of securing the payment of the said bonds and interest, as the same should become due and payable, the said railway company made and executed a certain mortgage or trust deed, a copy of which mortgage or trust deed is hereto annexed and marked Schedule "A" and forms part of this bill of complaint. That the said mortgage or trust deed after reciting that the railway company desired to contract a loan for the purpose of constructing, purchasing and equipping its said railway, and that a meeting of stockholders of said railway company was held on the 20th day of September, 1887, pursuant to law, authorizing the making of the said loan and the execution of said mortgage or trust deed, and whereas the same was unanimously authorized by the board of directors of said railway company, the said Chicago, Peoria & St. Louis Railway Company, in order to secure the payment of said bonds and all the interest to accrue thereon, in consideration of the premises and of one dollar to the said railway company duly paid by your orator, at or before the ensealing and delivery of the said mortgage or trust deed, the receipt whereof was thereby acknowledged, granted, bargained and sold, conveyed, transferred, assigned and set over unto your orator, and its successors in trust, all and singular the said railway now belonging, or which might thereafter belong to, the said railway company, and which the said railway company was authorized by law to construct, purchase and operate, as follows:

"Beginning in the city of Pekin, and terminating in the city of Jacksonville, together with a branch railway beginning in the city of Havana, and terminating in the city of Springfield, all in
4 the State of Illinois, being about one hundred and twenty miles of railway, more or less; and also all rolling stock, equipment and machinery, connected or to be connected with said railway, and all franchises now held or hereafter to be acquired, by the said party of the first part, its successors or assigns, in connection therewith, including, in the premises hereby granted, all the

railways, ways and rights of way, and all the depot grounds and other lands, and all the tracks, bridges, viaducts, culverts, fences, and other structures, and all the depots, stations, station-houses, engine-houses, car-houses, freight-houses, wood-houses, and other buildings, and all machine shops and other shops, held or acquired, and which shall be held or acquired for use upon the aforesaid line of railway, or in connection with the business thereof; and including also all the locomotives, tenders, passenger, baggage and freight and other cars, and all the rolling stock and equipment, and all the machinery, tools, implements, fuel and materials for constructing, operating, repairing or replacing the said railway, or the equipments or appurtenances of the said railway, now held or hereafter to be acquired by the said party of the first part, together with all and singular the tenements, hereditaments and appurtenances of the said railway and premises, or any part thereof belonging, or in anywise appertaining, and the reversion and reversions, remainder and remainders, tolls, incomes, rents, issues and profits thereof, and also all the estate, right, title, interest, property, possession, claim and demand whatsoever, as well in law as in equity, of the said party of the first part, of, in and to the same, and any and every part and parcel thereof, with the appurtenances, and all books of account and vouchers kept and to be kept by the said party of the first part, which the said party of the first part now holds or shall hereafter acquire, and also twenty-five hundred shares of the capital stock of the Peoria & Pekin Union Railway Company, amounting to two hundred and fifty thousand dollars, par value. To have and to hold the said railway and premises, and all the franchises and property hereinbefore described, unto the said party of the second part, and its successors in trust, forever. But in trust, nevertheless, for the uses and purposes, and with and subject to the powers, agreements and conditions hereinafter in that behalf mentioned and set forth."

It was further agreed, in and by the said mortgage or trust deed, that the said railway company should make and deliver unto your orator, and your orator should certify or countersign bonds of the said railway company to an amount not exceeding fifteen hundred thousand dollars at par, which bonds should be certified and delivered to the said railway company by your orator.

V. And your orator avers and alleges that said bonds, to the amount of fifteen hundred thousand dollars, were delivered to and certified by your orator, and have been issued for value and sold by said defendant to various individuals and firms, who are two numerous to be made parties to this bill of complaint.

VI. It was further agreed, in and by said mortgage or trust deed, that until default should be made by the railway company, or its successors or assigns, in the payment of the principal or interest of said bonds, the said railway company should be suffered and permitted to remain in the actual possession of the said railway and premises. It was further covenanted and agreed that the said railway company should keep said property so mortgaged, free from

all liens which might in any way become a prior lien to said mortgage or trust deed, or impair the liens of your orator.

VII. It was further agreed that your orator should have reasonable compensation for any services which it might thereafter render in the trust thereby created, to be paid by the said railway company; and your orator prays to refer to said mortgage or trust deed, which is hereto annexed and made part of this bill of complaint for the other terms of said mortgage or trust deed.

VIII. And your orator further shows unto your honors that on the first day of September, 1893, there became due and payable, and accruing upon the bonds secured by said mortgage or deed of trust, and then actually outstanding, the semi-annual installment of interest, evidenced by the coupons attached to said bonds, amounting to the sum of $37,500; that default was made in the payment of the interest on said bonds, and said installment and interest accruing on said bonds as aforesaid; that the said railway company wholly failed, omitted and refused to pay the said installment of interest, and to pay the interest mentioned and provided for in the said coupons due on said last-mentioned day, or upon any of them, but thereon wholly made default; that said coupons were on that day actually presented for payment at the place where the same were and are payable, to wit, in the city of New York, and payment thereof was demanded and refused, and such default and failure to pay still continues.

IX. Your orator further shows unto your honors that the holders of a large amount in value of said general consolidated mortgage bonds now actually outstanding have in writing requested your orator to enforce the remedies provided in said mortgage or trust deed.

X. And your orator further shows unto your honors that it is informed and believes that the said railway company is insolvent, and unable to pay its floating debt and current and present accruing indebtedness.

XI. Your orator further shows that the said mortgaged
6 property is insufficient and inadequate security for the payment of the outstanding bonds secured by the said mortgage; that there is danger that the said property be sold under judgments, and that the property and lines of said company may be separated and broken up, and the earning capacity destroyed or impaired by the contests of creditors for conflicting claims, and the mortgaged premises wasted and depleted.

XII. Your orator further shows unto your honors that no proceedings at law have been had, nor any suit or action commenced by or on behalf of your orators, or any holder of any of the bonds of the company secured by the mortgage aforesaid, for any interest unpaid or accrued thereon, except only this action.

In consideration whereof, and forasmuch as your orator is remediless in the premises, at and by the strict rules of the common law, and *are* only relievable in a court of equity, where matters of this kind are properly cognizable and relievable,

Your orator therefore prays the aid of this honorable court, and

that the said mortgage or deed of trust may be decreed to be a lien upon all the property mentioned and described therein, and upon all the property, real, personal or mixed, rights, franchises, lands, titles, railroads, branches, extensions, tolls incomes, rents and issues of the said railway company, described in the said mortgage or trust deed, within the jurisdiction of this honorable court, and that the said railway company may be decreed to pay unto your orator and the other bondholders under aforesaid mortgage or deed of trust all arrears of interest now due, or that may hereafter become due and payable upon said bonds, together with all the costs and expenses in this behalf incurred and expended. And in default thereof that the said defendant above named, and all persons claiming under it, may be forever barred and foreclosed of and from all equity of redemption and claim of in and to the said mortgaged premises, and every part and parcel thereof, and that all and singular the said mortgaged premises, within the jurisdiction of this honorable court, with the appurtenances, property and effects, rights, immunities and franchises in the said mortgage mentioned, may be sold under a decree of this honorable court, and that out of the money arising from the sale thereof, after deducting from the proceeds of any such sale just allowances for all disbursements and expenses of the said sale, including attorneys' and counsel fees, and the reasonable charges of your orator for services rendered as trustee and for all expenses incurred by it in the premises, and all payments which may be made for taxes or assessments on the said premises, or any part thereof, to apply the said proceeds to the payment of the principal of such of the aforesaid bonds as may be at that time unpaid,
7 whether or not the same shall have previously become due, and of the interest which shall at that time have accrued on the said principal and be unpaid, without discrimination or preference, ratably to the aggregate amount of such unpaid principal and accrued and unpaid interest.

And your orator further prays that an account may be taken of the bonds secured by the said mortgage, and of the amount due on said bonds for principal and interest, or either; and the names of the lawful holders thereof may be ascertained.

And your orator further prays that a receiver may be appointed according to the course and practice of this court, with the usual powers of receivers in like cases, of all the property, equitable interests, things in action, effects, moneys, receipts and earnings, rights, privileges, franchises and immunities of the said railway company, and its tolls, incomes, rents and issues, and of all other property included in and covered by the said mortgage within the jurisdiction of this honorable court, and that the defendants be decreed to make such transfer or conveyances to such receiver, and to the purchasers of said property at any sale as aforesaid, as may be necessary and proper to put them, or either of them, in possession and control of said property.

And your orator further prays that a writ of injunction issuing out of and under the seal of this honorable court, or issued by one of your honors, according to the form of the statute in such case

made and provided, directing, commanding, enjoining and restraining the said defendants, and each and every one of them, from interfering with, transferring, selling and disposing of any of the property mentioned in and covered by the said mortgage, or from taking possession of, levying upon or attempting to sell, either by judicial process or otherwise, any portion of the property embraced in or covered by the said mortgage; and that your orator may have such further or other relief in the premises as the nature of the circumstances of this case may require, and to this honorable court shall seem meet.

And may it please your honors to grant unto your orator a writ of injunction, issuing out of and under the seal of this honorable court, or issued by one of your honors, according to the form of the statute in such case made and provided, directing, commanding, enjoining and restraining the said defendants, and each and every one of them, from interfering with, transferring, selling or disposing of any of the property mentioned in or covered by the said mortgage, or from taking possession of, levying upon or attempting to sell, either by judicial process or otherwise, any portion of the property embraced in or covered by the said mortgage. And may it please your honors to grant unto your orator a subpœna of
8 the United States of America issuing out of and under the seal of this honorable court, directed to The Chicago, Peoria and St. Louis Railway Company, the defendant, therein and thereby commanding it, on a day certain therein to be named, and under a certain penalty to be and appear before this honorable court then and there to answer (but not under oath), all and singular the premises, and to stand to, perform and abide by the said order, direction and decree as may be made against it in the premises, as shall seem meet and agreeable to equity and good conscience.

And your orator, as in duty bound, will ever pray, etc.

THE MERCANTILE TRUST COMPANY,
By EDW. L. MONTGOMERY, *V. Pres't.*
[SEAL.] ALEXANDER & GREEN,
Solicitors for Complainant.

CHARLES B. ALEXANDER,
WILLIAM D. GUTHRIE,
Of Counsel.

Affidavit of Edward L. Montgomery.

UNITED STATES OF AMERICA, } ss:
Southern District of New York, }

Edward L. Montgomery, being duly sworn, says:

That he is the vice-president of The Mercantile Trust Company, the complainant in the foregoing bill of complaint, that he has read the foregoing bill of complaint, and knows the contents thereof; that the allegations therein contained, as far as they relate to his own acts, are true, and as far as they relate to the acts of others, he believes them to be true.

That in regard to all matters and things in the foregoing bill of complaint alleged, which are not within the personal knowledge of this deponent, the deponent has been fully informed, and he believes the same are true.

EDW. L. MONTGOMERY.

Sworn to before me this 19th day of September, 1893.

JOSEPH M. DENEL, [SEAL.]
U. S. Commissioner for the Southern
[SEAL.] *District of New York.*

(Indorsed:) Filed September 21, 1893. James T. Jones, clerk.

9 EXHIBIT A.

Mortgage.

This indenture, made the first day of March, in the year of our Lord one thousand eight hundred and eighty-eight, between the Chicago, Peoria and St. Louis Railway Company, a corporation of the State of Illinois, of the first part, and the Mercantile Trust Company of New York City, trustee, of the second part, witnesseth that:

Whereas, the said party of the first part is duly authorized by law to construct, lease, purchase and operate a railway beginning in the city of Pekin, in the county of Tazewell, and terminating in the city of Jacksonville, in the county of Morgan, with a branch railway beginning in the city of Havana, in the county of Mason, and terminating in the city of Springfield, in the county of Sangamon, all in the State of Illinois.

And whereas, the said party of the first part desires to contract a loan for the purpose of constructing, purchasing and equipping its said railway.

And whereas, at a meeting of the stockholders of said railway company held on the 20th day of September, A. D. 1887, pursuant to law, resolutions were passed by a vote of more than three-fourths of the outstanding stock of said company, whereby the board of directors was authorized, for the purpose of constructing, purchasing and equipping its railway, to contract for a loan, and to secure the payment of the same by mortgage of its corporate property and franchises acquired and to be acquired.

And whereas, at a meeting subsequently held, a quorum being present, the board of directors of said company, by resolution unanimously adopted, authorized the president of said company to negotiate a loan as proposed by said stockholders, as aforesaid.

And whereas, in pursuance of the power and authority duly vested in it, the said party of the first part, in order to defray its obligations in connection with the construction, purchase and equipment of said railway, is about to issue a series of bonds, the aggregate amount whereof to be at any time outstanding is limited to $1,500,000 in said bonds, at par, which said bonds shall be of like tenor and date, and for $1,000 each, and be payable in forty years

from date in gold coin of the United States of America, at the city of New York, and bear interest at the rate of five per cent. per annum, payable semi-annually, in the like gold coin, at the said city of New York, which payment of interest shall in all cases be made without deduction for State or United States taxes.

10 And whereas, the said bonds are, or are to be, all of like tenor and date, and in substantially the following form:

No. —. $1,000.

"The Chicago, Peoria & St. Louis Railway Company"

First Mortgage Five per Cent. Gold Bond.

The Chicago, Peoria & St. Louis Railway Company, for value received, hereby acknowledges itself indebted to the bearer in the sum of one thousand dollars in United States gold coin which indebtedness it promises to pay on the first day of March, A. D. 1928, in the city of New York, with interest thereon from the first day of March, A. D. 1888, at the rate of five per cent. per annum, payable semi-annually in the city of New York, on the presentation and surrender of the annexed coupons as they severally become due. If the obligor or its successors shall make default in the payment of the semi-annual interest on this bond for six months from the day it becomes due, then, without demand or notice, the whole principal thereof shall become due and payable, and may at once be enforced against this company, or its successors.

This bond is one of a series of similar bonds issued and to be issued from time to time by said railway company, the aggregate amount whereof to be at any time outstanding is limited to fifteen hundred thousand dollars in said bonds, at par; and the payment of this bond, in common with the other bonds of said series, is secured by a deed of trust or mortgage, bearing even date herewith, and conveying to the Mercantile Trust Company of New York, trustee, all and singular the Chicago, Peoria & St. Louis railway, beginning in the city of Pekin and terminating in the city of Jacksonville, with a branch railway beginning in the city of Havana and terminating in the city of Springfield, all in the State of Illinois, together with the equipments and appurtenances of the said railway, and all rights, privileges and franchises thereunto pertaining.

This bond shall not be valid or obligatory until the certificate authenticating the same, which is endorsed hereon, shall have been duly signed by the said trustee.

In witness whereof, the said railway company has caused its corporate seal to be hereunto affixed, and the same to be attested by the signatures of the president and secretary, and has likewise caused the signature of the secretary to be affixed to the several coupons hereunto annexed, at the city of Jacksonville, in the State of Illinois, this first day of March, A. D. 1888.

"THE CHICAGO, PEORIA AND ST. LOUIS RAILWAY COMPANY,

[SEAL.] By —— ——, *President*,

—— ——, *Secretary.*"

11 STATE OF ILLINOIS.

UNITED STATES OF AMERICA.

"Trustee's Certificate."

The Mercantile Trust Company of New York hereby certifies that this bond is one of a series of bonds issued under the within-mentioned mortgage or deed of trust.

THE MERCANTILE TRUST COMPANY, *Trustee*,
By —— ——, *President.*

And, whereas, each of the said bonds has coupons thereto annexed, representing the several installments of interest to become due thereon, and said coupons bear the engraved signature of the secretary of said company, and are in substantially the following form:

(*Form of Coupon.*)

The Chicago, Peoria & St. Louis Railway Company will pay to the bearer, in the city of N York, twenty-five dollars in United States gold coin on the first day of ——, 1—, being six months' interest on bond number —.

—— ——, *Secretary.*

And, whereas, it is the true intent and meaning of these presents that each and all of the said bonds, whether now executed or hereafter to be executed, shall be equally secured to be paid by these presents:

Now, therefore, this indenture witnesseth that the said party of the first part, in order the better to secure the payment of said bonds and all of the interest to accrue thereon, and for and in consideration of the premises, and of the sum of one dollar to the party of the first part duly paid by the said party of the second part, at or before the ensealing and delivery of these presents, the receipt whereof is hereby acknowledged, hath granted, bargained and sold, and by these presents doth grant, bargain, sell, convey, transfer, assign and set over unto said party of the second part, and its successors in trust, all and singular the said railway now belonging, and which may hereafter belong to the said party of the first
12 part, and which the said party of the first part is by law authorized to construct, purchase and operate, beginning in the city of Pekin and terminating in the city of Jacksonville, together with a branch railway beginning in the city of Havana and terminating in the city of Springfield, all in the State of Illinois, being about one hundred and twenty miles of railway, more or less; and also all rolling stock, equipment and machinery connected or to be connected with said railway, and all franchises now held or hereafter to be acquired by the said party of the first part, its successors or assigns, in connection therewith, including in the premises hereby granted all the railways, ways and rights of way, and all the depot grounds and other lands, and all the t-acks, bridges, viaducts, cul-

verts, fences and other structures, and all the depots, stations, station-houses, engine-houses, car-houses, freight-houses, wood-houses and other buildings, and all machine shops and other shops held or acquired, and which shall be held and acquired for use upon the aforesaid line of railway, or in connection with the business thereof, and including also all the locomotives, tenders, passenger, baggage, freight and other cars, and all the rolling stock and equipment, and all the machinery, tools, implements, fuel and materials for constructing, operating, repairing or replacing the said railway, or the equipments or appurtenances of the said railway now held or hereafter to be acquired by the said party of the first part, together with all and singular the tenements, hereditaments and appurtenances to the said railway and premises, or any part thereof, belonging, or in anywise appertaining, and the reversion and reversions, remainder and remainders, tolls, incomes, rents, issues and profits thereof, and also all the estate, right, title, interest, property, possession, claim and demand whatsoever, as well in law as in equity, of the said party of the first part of, in and to the same, and any and every part and parcel thereof, with the appurtenances, and all books of account and vouchers kept and to be kept by the said party of the first part, which the said party of the first part now holds or shall hereafter acquire, and also twenty-five hundred shares of the capital stock of the Peoria & Pekin Union Railway Company, amounting to two hundred and fifty thousand dollars, par value. To have and to hold the said railway and premises and all the franchises and property hereinbefore described unto the said party of the second part and its successors in trust forever. But in trust, nevertheless, for the uses and purposes and with and subject to the powers, agreements and conditions hereinafter in that behalf mentioned and set forth.

And this indenture further witnesseth, that for the consideration aforesaid, and in order the better and more effectually to secure the payment of said bonds, and of all interest to accrue thereon,
13 the said party of the first part has covenanted, promised, granted and agreed to and with the said party of the second part, and its successors as follows, to wit:

Article first. The party of the first part shall make, execute and deliver unto the said party of the second part, and the said party of the second part shall certify or countersign bonds of the party of the first part intended to be secured hereby to an amount not exceeding fifteen hundred thousand dollars ($1,500,000) at par, which bonds shall be certified and delivered to the party of the first part by the party of the second part.

Article second. Until default shall be made by the said party of the first part, its successors or assigns, in the payment of interest or principal of said bonds, or in the due observance of the covenants and agreements hereinafter contained on the part and behalf of the said party of the first part, the said party of the first part, its successors and assigns, shall be suffered and permitted to remain in the actual possession of said railway and premises, and to exercise the franchises and rights relating thereto, and to collect, receive and

use revenues and profits thereof in any manner which will not impair the lien created by these presents.

And the said party of the first part hereby covenants, promises and agrees to and with the said party of the second part and its successors, that the said party of the first part, its successors and assigns, remaining in the possession of the said railway and premises, shall and will keep the said railway in good order and safe running condition, and shall and will from time to time pay and discharge all taxes, assessments and government charges, which may be lawfully imposed upon the said railway and premises, or upon any part thereof, and the lien of which might or could be held to be prior to the lien of these presents, so that the priority of these presents may be duly preserved, and that the said party of the first part will not do or suffer any act or thing whatsoever, whereby the lien hereof may or can be impaired, until the said bonds and all interest thereon shall be fully paid and satisfied.

Article third. In case default shall be made in the payment of any semi-annual installment of interest which may accrue upon the said bonds or upon any of them, when such interest shall become due and be demanded, and such interest or any part thereof, shall remain unpaid and in arrears for the period of six months, or in case default shall be made in the due observance and performance of the covenant of further assurance hereinafter set forth, or in the payment of any taxes, assessments or other governmental charges, which may be lawfully levied or imposed upon the said railway and premises, or upon any part thereof, and either of said last-mentioned defaults shall continue for the period of six months,
14 or in case default shall be made in the payment of the principal of said bonds, or any one of them, then, and in any and every such case of default, it shall be lawful for the said party of the second part, as the trustee, under these presents, or for any successors of the said party of the second part in the trust created by these presents, to enter into and upon the railway and premises hereinbefore granted or conveyed, and each and every part of the same, and from thenceforth the said railway and premises and each and every part thereof, and all and singular the rights and franchises hereinbefore granted, to have, hold and enjoy, operating the said premises by such superintendents, managers, receivers, assistants and servants, or other attorneys or agents as the said trustee shall deem proper, and making from time to time all such repairs and replacements, and all such useful alterations, additions and improvements to said railway and premises as the said trustee may deem expedient and judicious. And it shall likewise be lawful for the said trustee, after any and every default happening and continuing aforesaid, to collect and receive all revenues and profits of the said railway and premises, and every part and parcel thereof, and after deducting therefrom all the expenses lawfully incurred in making such entry, or in otherwise obtaining possession of said premises, including reasonable attorney and counsel fees, as well as any and all expenses of holding, operating and managing the said railway and premises, and conducting the business thereof,

including the costs and expenses of all such repairs, replacements, alterations, additions and improvements, as may be made by said trustees as aforesaid, and all payments which may be made or be due for taxes and assessments, or other charges or liens prior to the liens of these presents upon the said railway and premises, or upon any part or parcel thereof; and just compensation for the trustee's own services, to apply any and all revenues and profits of the said railway and premises which may be received by said trustee as aforesaid, to the payment first, of all overdue interest on said bonds, with interest thereon, and secondly, to the payment of all interest accruing during such possession of said trustee, which payment of interest shall be made to the holders of the bonds and coupons, evidencing the right to the same, ratably and without discrimination or preference between them.

Article fourth. It is hereby mutually agreed that at any sale of the railway and property hereinbefore conveyed, which may be made for the purpose of enforcing the lien of these presents, the trustee under these presents, for the time being, may in its own discretion, and not otherwise bid for, and if the same be obtainable at the price hereinafter mentioned, purchase and acquire the property so offered for sale, in behalf of all the holders of the bonds aforesaid which shall then be outstanding in proportion to the amount of said bonds, and of the overdue coupons thereunto belonging, by them respectively held.

Provided, however, that nothing herein contained shall authorize the said trustee to bid for the entire property then held upon the trusts of this indenture on behalf of the holders of said bonds, a sum exceeding the whole amount of said bonds then outstanding, with the interest accrued thereon, and the expenses of such sale, or an amount reasonably proportionate thereto, for any part of said property.

And it is hereby further agreed that the bonds and overdue coupons aforesaid, or any of them, shall be received in payment on account of the purchase-money of any property which shall be offered for sale as aforesaid as equivalent to so much of the said purchase money as would be distributable and payable thereon out of the proceeds of such sale.

Article fifth. In case default shall be made in the payment of any semi-annual installment of interest to accrue on any of the said bonds when such interest shall become payable, and if such interest shall remain unpaid and in arrear for the space of six months, then, and in each and every such case of the happening and continuing of such default in the payment of interest, the principal of each and all of the said bonds may be declared by the trustee for the time being hereunder, or by a majority in interest of the holders of all the said bonds which may then be outstanding and unpaid, at the option of such trustee, or of such majority in interest of bondholders, to be and thereupon the same shall become and be due and payable immediately, notwithstanding that the time limited in said bonds for payment thereof may not then have elapsed.

Article sixth. It is hereby expressly declared and agreed that in

case default shall be made in the payment of interest upon any of the said bonds when such interest shall become due and be demanded, and such default shall continue for the space of six months, or in case default shall be made in the payment of the principal of any of the said bonds when the same shall become due, then, and in either and every such case of default, it shall be the duty of the trustee for the time being, under these presents, to take appropriate proceedings at law or in equity to enforce the rights of the holders of said bonds upon a requisition to that effect being made upon the said trustee, signed by the holders of at least one-third in amount of the said bonds then outstanding.

Article seventh. The trustee, under these presents, shall
16 have at all times, while the said bonds or any of them remain outstanding, and is hereby granted full power and authority, to be exercised in the discretion of said trustee and not otherwise, to release from the lien and operation of these presents, in such manner as it may be advised upon the request in writing of the said party of the first part, its successors or assigns, any portion of the aforesaid premises, not being a part of the main line of the said railway which, in the judgment of such trustee, shall not be necessary for use in connection therewith, and which shall have been acquired for station or depot purposes, or for shops or other buildings, or for supplying fuel, gravel, or other material, but which, in the judgment of such trustee, it shall have become unnecessary or inexpedient to retain in consequence of its having become necessary or desirable to change the location of such depot, shop or other building, or to substitute other lands for the purpose of supplying such fuel, gravel or material; provided, always, that any and all lands and premises which shall be acquired for station or depot purposes, or for shops or other buildings, or for the purpose of supplying fuel, gravel or other material, shall be conveyed to the said trustee to be held by it, upon the trusts of these presents in the same manner as the premises so released. And the said trustee may also allow the said company, its successors or assigns, to dispose of any rolling stock, equipment and machinery or other personal property, which may be held for use upon or in connection with said railway, or the business thereof, but which in said trustee's judgment shall have become unfit, or undesirable for such use; provided, always, that any and all rolling stock, equipment and machinery or other personal property which may be acquired in substitution for any similar property so disposed of, shall become and be subject to the lien of these presents.

Article eighth. It is hereby expressly declared, and these presents are upon the condition, that if the said party of the first part shall well and truly pay and discharge the interest on each and every of the said bonds as the same shall mature, and shall well and truly pay and discharge the principal of each and every of the said bonds when such principal shall become due and payable, according to the true intent and meaning of said bonds, and of these presents, and shall well and truly keep and perform the other covenants and agreements in these presents contained, to be by it kept

and performed, then these presents, and all the estate and interest thereby granted shall cease, determine and become void, otherwise the same shall be and remain in full force and virtue, and the said party of the first part hereby covenants, promises and agrees to and with the said party of the second part, and to and with its successors in trust, that the said party of the first part shall and will well and truly pay the said bonds, and all interest to accrue
17 thereon, at the times and in the manner in said bonds mentioned, and according to the true intent and meaning thereof.

Article ninth. It is hereby declared and agreed that the trustee under these presents shall be entitled to a reasonable compensation for any services which the said trustee may hereafter render in the trust hereby created to be paid by the said party of the first part; that the said trustee shall not be answerable for the default or misconduct of any agent or attorney who may be appointed by it in pursuance of these presents, if such agent or attorney be selected with reasonable care, and that the said trustee shall not be answerable or accountable for anything whatever in connection with said trust, but gross negligence or willful misconduct or default. And it is further declared and agreed that the trustee hereunder may at any time be removed by a majority in interest of the *bona fide* holders of said bonds, provided such removal be made by an instrument in writing under seal duly executed and acknowledged; that the said trustee may resign the trust under these presents at any time by giving sixty days' notice, in writing, of the intention so to do, to the said party of the first part, and to such of the holders of said bonds as shall have registered with such trustee their names and post-office addresses, provided such notice of resignation be served on the said party of the first part at its principal office, and on the bondholders who shall have so registered their names and addresses with said trustee, by the deposit thereof in the mail directed to the said bondholders respectively. And it is further agreed and declared that in case the trustee, hereby appointed, or any successor of such trustee, shall at any time hereafter resign the said trust, or be removed therefrom, as aforesaid, another trustee or trustees may and shall be appointed by a majority in interest of the holders of said bonds, by an instrument in writing duly signed by such majority in interest of said bondholders, given at a meeting of such bondholders, duly convened and held as hereinafter provided.

And it is further agreed and declared that in case the appointment of a trustee shall be unduly delayed, and the trust shall remain vacant for more than sixty days, any holder or holders of said bonds to the aggregate amount of one hundred thousand dollars or upwards, upon reasonable notice to the said party of the first part, may apply to any court of competent jurisdiction for the appointment of a new trustee, but no bondholder shall be entitled to make such application to court until a reasonable time, to wit: sixty days shall have been allowed for the purpose of enabling a majority in interest of said bondholders to appoint a new trustee as aforesaid.

And it is hereby further agreed that it shall be the duty of
18 any trustee resigning or being removed as aforesaid, to execute, acknowledge and deliver, not at his own cost or expense,

but at the cost and expense of the party of the first part, any and all deeds and instruments which such trustee may be reasonably requested by the said new trustee to execute for the purpose of assuring the title in said premises to such new trustee.

And it is further hereby expressly declared and agreed that whenever, and as often as any contingency shall arise in which the action of a majority in interest of the holders of said bonds shall be necessary, or in which the said bondholders are herein declared to have any discretionary voice or power, the trustee hereunder shall be, and is hereby authorized and empowered at the proper cost and expenses of the said party of the first part, to call a meeting of all the holders of bonds secured hereby, to be held in the city of New York, by advertisement to be published three times in each week for four weeks in one newspaper of good circulation amongst the business community in that city, and in default of such meeting being called by said trustee, within ten days after notification in writing by any bondholder of the necessity therefor, it shall be competent for any holder or holders of said bonds to the aggregate amount of one hundred thousand dollars, to call said meeting in the manner aforesaid.

Provided, however, that at any meeting called as aforesaid, a majority in interest of the holders of said bonds may prescribe and establish such rules as they may deem proper for the calling of future similar meetings, and the regulation of the proceedings thereof. And it is hereby declared and agreed that at any meeting convened and held pursuant to these presents, the holders of said bonds shall be competent to exercise in person or by proxy all the powers and authority conferred upon them by these presents.

Provided, nevertheless, that any person appearing at said meeting of bondholders, and claiming the right to participate therein, shall, if requested by any bondholder present thereat, produce the bond or bonds upon which such person may claim the right to vote at such meeting, or file an affidavit with the chairman of the meeting that he, the person so claiming the right to participate in such meeting is a holder of one or more of the bonds aforesaid, or the proxy of such holder, in which affidavit he shall specify the amount and number of the bonds which he claims to hold, or represent, before being allowed to vote at such meeting, except for the purpose of temporarily organizing the same, and on the adjournment of such meeting all such affidavits shall be delivered to the trustee under these presents.

And this indenture further witnesseth, that the said party of the first part, for the consideration aforesaid, has promised and
19 agreed, and does hereby covenant, promise and agree to and with the said party of the second part, and its successors, that the said party of the first part, its successors and assigns, shall and will well and truly pay or cause to be paid, unto the holder or holders of said bonds, the principal and interest thereof, as the same shall become payable according to the tenor of said bonds and the terms of the coupons thereto annexed; and shall and will do, observe and perform any and every act and thing mentioned in or

required by these presents, to be by it or them done, observed and performed, and that the said party of the first part, its successors and assigns, shall and will, from time to time, and at all times hereafter, and as often as thereunto requested by the trustee under this indenture, execute, acknowledge and deliver all such further deeds, conveyances and assurances in the law for the better assuring unto the said party of the second part, and unto its successors, upon the trusts herein expressed, the railway, equipments, appurtenances, franchises, property and things hereinbefore mentioned, and particularly any and all franchises whatsoever, which shall or may at any time hereafter, while the said bonds or any of them, remaining unpaid, be acquired by the said party of the first part, its successors or assigns, as by the said trustee or by its co-nsel, learned in the law shall be reasonably advised, directed or required.

In witness whereof, the said party of the first part has caused its corporate seal to be hereunto affixed, and these presents to be signed by its president and secretary on the day and year first above written, and the said party of the second part, in order to evidence its acceptance of the trust hereby created, has also caused its corporate seal to be hereunto affixed and these presents to be signed by its president and secretary.

THE CHICAGO, PEORIA & ST. LOUIS RAILWAY COMPANY,
By WILLIAM S. HOOK, *President.*

(Attest:) EDWARD L. McDONALD, *Secretary.*

[CORPORATE SEAL.]

THE MERCANTILE TRUST COMPANY OF NEW YORK CITY, *Trustee,*
By WILLIAM S. HOOK, *President.*

(Attest:) EDWARD L. McDONALD, *Secretary.*

[CORPORATE SEAL.]

20 And afterwards, to wit: on the said twenty-first day of September, in the June term of said court, in the year of our Lord one thousand eight hundred and ninety-three, the following proceedings were had in said court in said cause, and entered of record to wit:

Order, Sept. 21, 1893.

THE MERCANTILE TRUST COMPANY OF New York, Complainant, *vs.* THE CHICAGO, PEORIA & ST. LOUIS RAILway Company, Defendant.	In Equity. Consolidated Cause.

Now comes The Mercantile Trust Company of New York by Alexander & Green, its solicitors, and C. B. Alexander, of counsel, and come also R. J. Cavett, John M. Coughlin *et al.*, Woodward &

Tiernan Printing Company, St. Louis & Eastern Railway Company, by Bluford Wilson, their solicitor; comes also The Atchison, Topeka & Santa Fe Railroad Company, by George R. Peck, its solicitor; comes also The Chicago, Peoria & St. Louis Railway Company, by I. L. Morrision, its solicitor, and said parties, except the said defendant, The Chicago, Peoria & St. Louis Railway Company, move for the appointment of a receiver of all and singular the premises and property in the said bill of complaint of the Mercantile Trust Company, and of said several intervening bills, petitions and cross-petitions consolidated therewith, upon consideration whereof, and it appearing to the court from the papers filed in said causes consolidated, that a receiver or receivers should be appointed for the property described in said several bills, petitions and cross-petitions, the said Chicago, Peoria & St. Louis Railway Company objecting thereto, it does therefore order, adjudge and decree that C. H. Bosworth, of the city of Springfield, Illinois, and E. Ellery Anderson, of New York city, be, and they hereby are appointed receivers of all and singular the said property above mentioned upon respectively executing a bond, with good and sufficient security to be approved by this court in the sum of $50,000 each,
21 conditioned for the faithful performance of their several duties as such receivers respectively, for obeying all the lawful orders of the court herein. Such bond may, in the case of E. Ellery Anderson, be executed before and the justification taken before a commissioner for the southern district of New York, and the surety may be approved by one of the judges of the circuit court of the United States for the southern district of New York, and upon approval of said bond and upon taking the official oath, shall be sufficient qualification as receiver, the one first qualifying taking possession for the two jointly, and such receiver shall forthwith be in possession of, operate and maintain said railroad and premises alone until the other receiver is qualified, being the railroad of the Chicago, Peoria & St. Louis Railway Company, comprising also the Jacksonville, Louisville & St. Louis Railroad Company, the Litchfield, Carrollton & Western Railroad Company and the Louisville & St. Louis Railway Company, and including a partially constructed line of railway northwestwardly from Havana, together with all the constituent railroad lines now operated by the said Chicago, Peoria and St. Louis railway line, commonly known as the "Jacksonville Southeastern line," more fully and particularly described as follows, to wit: Extending, lying and being a railroad from the city of Pekin, through the counties of Tazewell, Mason, Cass, to and through the city of Jacksonville, in the county of Morgan, and thence through the said county of Morgan and the counties of Macoupin and Montgomery to and through Litchfield, and thence through the counties of Montgomery, Macoupin, Madison and St. Clair, to East St. Louis, in said last-named county; and from Litchfield southeasterly through the counties of Montgomery, Bond and Clinton, to Centralia in the county of Marion, and thence through the county of Marion to Drivers, in the county of Jefferson; and from Havana, in said county of Mason, to Petersburg, in the

county of Menard, and thence through Springfield, in the county of Sangamon; also from Barnett westwardly through Carlinville, in said county of Macoupin, thence through Carrollton, in the county of Greene, to Columbiana, on the Illinois river, together with all interests in and contract rights and privileges for the use of the Peoria and Pekin Union railway, from the said city of Pekin to the city of Peoria, in the county of Peoria, and all the terminal contract rights and privileges at East St. Louis, all in the State of Illinois, together with all the equipments owned, leased or held in car trusts or otherwise, and the tolls, rents, incomes, franchises, issues and profits of the said Chicago, Peoria and St. Louis Railway Company and its said constituent companies, and all their appurtenances as well as their land and other premises as now held, used and operated by the said company, as fully described in their existing mort-

22 gages, deeds of trust, leases, contracts, and other evidences of title and possession, reference thereto for greater certainty to be had, with all property rights, powers, privileges and franchises and equities now owned, possessed, held or controlled by the said The Chicago, Peoria and St. Louis Railway Company, it being the purpose and intention of this order to clothe the said receiver with all the property rights, powers, privileges and franchises now owned, possessed, held or controlled by the said The Chicago, Peoria and St. Louis Railway Company, or any of the said constituent or affiliated lines now under a common management, as the Jacksonville Southeastern line.

It is further ordered, adjudged and decreed, that the said Chicago, Peoria and St. Louis Railway Company, its officers, agents, servants, employés, and any and all persons in any way having the custody of any property or funds belonging to the said railway company in any way, shall turn over to the said receivers or receiver, on demand, any and all property to which said receivers or receiver are entitled under this order, together with all books, moneys, assets, accounts, choses in action, and property of every nature and kind belonging to or in the possession of the said defendant company or any of its constituents; and all persons are hereby forbidden in any manner to interfere with the possession of said receivers or receiver, or to prosecute any suit or suits against the defendant railway company without the consent of the court first had and obtained.

And the said receivers are hereby clothed with all the authority and rights usually given to receivers by courts of equity, to take charge of, care for and operate a railroad; to make report of his acts and doings at least every month to the court, and at any other time when ordered by the court, to collect and receive the tolls, rents, moneys, issues and profits of said premises and property as covered by this order, and out of the same, they shall put, maintain and keep said property in good repair, and shall further pay:

First. All past-due taxes.

Second. All current operating expenses.

Third. All past-due wages as shown by the pay-rolls and on such proof as shall be satisfactory to the receivers or receiver.

Fourth. All claims for materials and supplies which have been

incurred in the operation and maintenance of said property during the six months last past, and all ticket trackage balances due from said railroad.

(To which last item No. 4 counsel for the Mercantile Trust Company, trustee, objects, and which objection the court upon argument overrules.)

23 In their reports so ordered to be made of receipts and expenditures and their doings under this order, the said receivers shall report whether there are any funds in their hands accruing from said income applicable to payment of interest or principal of any indebtedness of the said Chicago, Peoria & St. Louis Railway Company, or any of the constituent companies out of which by consolidation, lease or otherwise it has been formed, and power and authority are hereby reserved to any party interested in any of the constituent companies out of which said company was formed to apply to the court for a direction to the receivers to keep an account of the receipts and expenditures of such constituent company, so as to preserve and secure any special rights which the court may find to exist in favor of such constituent company. And all other matters not included in this order are reserved for the future consideration of the court. And the said C. H. Bosworth, comes and files his bond, which is approved by the court, and takes the oath of office, and accepts the office of receiver hereby conferred upon him.

24 Afterwards, to wit, on the twenty-sixth day of January, in the year of our Lord one thousand eight hundred and ninety-five, came Jacob Rau, by his solicitors, and filed in the clerk's office of said court *its* intervening petition, which is as follows, to wit:

Intervening Petition of Jacob Rau.

In the Circuit Court of the United States in and for the Southern District of Illinois.

THE MERCANTILE TRUST COMPANY OF NEW YORK, Complainant,
vs.
THE CHICAGO, PEORIA & ST. LOUIS RAILWAY COMPANY, Defendant.
} Consolidated Cause.

Intervening petition of Jacob Rau.

To the honorable the judges of said court:

Comes now your petitioner, Jacob Rau, a citizen of the State of Minnesota, residing at Wykoff therein, intervening herein, and by leave of court first had and obtained, files this his petition, and complaining of the Chicago, Peoria & St. Louis Railway Company, a corporation duly organized and existing under and by virtue of the laws of the State of Illinois, and having its principal office and place of business at Springfield therein, states:

That on the 10th day of October, 1894, and on the 16th day of the same month, your petitioner at Wykoff, in the State of Minnesota, delivered to the Chicago, Milwaukee & St. Paul Railway Company a car-load of barley on each one of said days in cars of that company, to wit: October 10, 1894, car No. 46064, and on October 16, 1894, car No. 43222; that each one of said cars of barley was consigned to the Orthwein Grain Company, St. Louis, Missouri, by way of East St. Louis; that each one of said cars of barley was transported by said Chicago, Milwaukee & St. Paul Railway Company to its station at Rock Island, the terminus of its line of railroad,

and at that place each one of said cars was delivered to the
25 Rock Island & Peoria Railroad Company, and by said last-named company transported to Peoria, in said State of Illinois, and there delivered to the Chicago, Peoria & St. Louis Railway Company, to be transported by it to destination; that said last-named company received said two car-loads of barley, and transported same as far as East St. Louis, a station on its line of road, and while the same were still in transit, and on their way to destination, and in the possession and under the control of said last-named company, the said two cars containing said barley, were destroyed by fire on the evening of the 28th day of October, 1894; that said two car-loads of barley were of the value of eleven hundred, forty-four dollars and seven cents ($1,144.07), and on account of the loss and destruction of said barley by fire, as aforesaid, your petitioner has suffered damage to that amount.

Your petitioner further states that said barley belonged to him at the time it was so destroyed by fire, and that he was the sole owner thereof.

Your petitioner further shows, that on the 21st day of September, 1893, in the suit of The Mercantile Trust Company of New York, complainant, against The Chicago, Peoria & St. Louis Railway Company, in the circuit court of the United States, southern district of Illinois, Mr. C. H. Bosworth was, by an order duly entered therein, appointed the receiver thereof, and placed in charge of the property, rights and franchises of said defendant railway company, and as such receiver has ever since the date of his appointment been engaged in managing and operating the railroad of said defendant railway company, in the transportation of persons and property over and upon the same, and that the liability of said railway company to your petitioner was incurred while its railroad was being operated by said receiver, and that the claim and demand of your petitioner herein is of a kind, and accrued within a time which entitles it to a priority over debts and demands secured by mortgages, and to a payment by said receiver out of any funds which may come into his hands while operating the railroad of said defendant railway company.

Wherefore, your petitioner prays that said sum of eleven hundred forty-four dollars and seven cents ($1,144.07), may be allowed against said receiver appointed as aforesaid; that said claim be declared a lien paramount to all other claims against the property of said Chicago, Peoria & St. Louis Railway Company, prior in right to

the claims of mortgages, and a lien upon any money in the hands of said receiver, not otherwise appropriated; that the said receiver be ordered to pay the said amount out of any moneys that may come into his hands, or out of the proceeds of the sale of the property before any distribution shall be made of the same, and
26 for such other and further orders and decrees as to the court shall seem meet and proper.

JACOB RAU.

BURTON HANSON,
GEORGE P. CARY,
Attorneys for Petitioners.

UNITED STATES OF AMERICA, }
Northern District of Iowa, } ss:

Jacob Rau, being duly sworn, deposes and says that he is the petitioner above named; that he has read the foregoing petition, and knows the contents thereof, and that the matters alleged and set forth therein are true.

JACOB RAU.

Subscribed and sworn to before me this 10th day of January, A. D. 1895.

FRED WENDORF,
[SEAL.] *Notary Public.*

(Indorsed:) Filed January 26, 1895. James T. Jones, clerk.

27 Then afterwards, to wit: on the 11th day of March, in the year last aforesaid, came the receiver, by his solicitor, and filed in the clerk's office of said court his answer to said intervening petition of Jacob Rau, which answer is as follows, to wit:

Answer. Filed March 11, 1895.

In the Circuit Court of the United States for Southern District of Illinois.

THE MERCANTILE TRUST COMPANY OF NEW YORK *vs.* THE CHICAGO, PEORIA & ST. LOUIS RAILWAY COMPANY *et al.* } Consolidated. In Equity.

Answer of the receiver herein to the intervening petitions of C., M. & St. P. R'y Co., W. W. Cargill Company, T. McMichael & Son, S. Y. Hyde Elevator Company, Huntting Elevator Company, Jacob Rau, Gilchrist & Company, Henry Rippe, and Carr, Ryder & Engler Company.

The receiver now and at all times hereafter saving to itself all benefit and advantage of exceptions, or otherwise, to the many errors, uncertainties, and other imperfections in the said intervening petitions contained, for answer thereto says:

That after the delivery of the said cars and their contents to this receiver, and before the filing of the said intervening petitions, the said cars and their contents were delivered by this receiver, in the due course of business, to the Terminal Railroad Association of St. Louis. And that while in the possession and under the care of the said Terminal Association the said cars and contents were damaged or destroyed.

And this receiver, further answering, says that the said cars and contents, in addition to being in the custody and care of said Terminal Association, were damaged and destroyed by fire negligently caused by and originating in a spark coming from a certain engine belonging to and being operated by and in the service of the said Terminal Association of St. Louis.

This receiver, further answering, says that the property mentioned in said petitions was destroyed or damaged by fire at East St. Louis during the night of October 28, 1894, and was at the time of said fire in the care and custody of the said Terminal Rail-
28 road Association of St. Louis, under a contract by which said association was to give to your receiver terminal facilities at East St. Louis, and that according to which it undertook to handle your receiver's trains, care for his engines and cars, and handle and care for his freight, including the property mentioned in the said intervening petitions, a copy of which contract is attached hereto and prayed to be taken as a part hereof; that the property mentioned in said intervening petitions was in the care of said Terminal Association, in the course of a regular interchange of business with that association, in accordance with the said contract and in accordance with the custom that had been in force for the past four years, in which it became and was the duty of the said Terminal Association to exercise due care and caution in the safe keeping and handling said cars and freight while in the custody and control of the same; but, unmindful thereof, and of its duty in the premises, the said Terminal Association willfully and negligently stored the said property in close proximity to a certain load of baled hay, which hay was fired by sparks from a certain passing switch-engine belonging to and then in the service and use of the said Terminal Association, which fire was communicated to the building and so to the property mentioned in said intervening petitions.

And this receiver, further answering, says by reason of the negligence of said Terminal Association in so storing such highly combustible and inflammable goods as baled hay in a building so constructed as to be a veritable fire-trap, in close proximity to railroad tracks, on which there were continually passing and repassing engines emitting sparks of fire, the conflagration of October 28, 1894, was caused. In said conflagration more than forty cars and their valuable contents were either wholly destroyed or damaged, notwithstanding the fact that the said Terminal Association had cars stored side by side with those destroyed or damaged, they were enabled and did save all of their said cars and sustained practically no loss on account of them.

Therefore your receiver denies that the petitioners are entitled

to the relief, or any part thereof, demanded as against this receiver, and to avoid a multiplicity of suits, asks this honorable court to make the said Terminal Railroad Association of St. Louis a party defendant hereto, and that a summons may be issued against said Terminal Railroad Association of St. Louis, commanding it to plead, answer, or demur, within a short time to be fixed by this court, to the allegations contained in the said intervening petitions, and this answer thereto, and to abide and be bound by any order that this court may make herein.

C. H. BOSWORTH, *Receiver.*
By BLUFORD WILSON, *Solicitor.*

29 *Memorandum of Agreement.*

Memorandum of an agreement, made this 1st day of June, A. D. 1891, by and between the Terminal Railroad Association of St. Louis, party of the first part, and the Chicago, Peoria and St. Louis Railway Company, party of the second part—

Witnesseth: That, whereas, the party of the first part desires to give the party of the second part terminal facilities at East St. Louis, Illinois, and St. Louis, Missouri, for the handling of its trains, care of its engines and cars, and the handling and care of its freight, on the terms and conditions following:

First. It is agreed that the party of the first part shall furnish the necessary yard room, or track facilities in the yards of the party of the first part in East St. Louis, Illinois, as now located, and the necessary switch-engines and yardmen to do the switching of the party of the second part in making up and breaking up all freight trains that depart from and arrive at East St. Louis; and the charge for the facilities and the work above named shall be at the rate of fifty cents (50) per loaded car in and out; empty cars in and out free.

Second. Cars made "bad order" by and during the making up and breaking up of trains in the yards set aside for the use of the party of the second part, to be repaired by the party of the second part, and the party of the second part shall furnish its own car inspectors.

All car- made "bad order" outside of the yards set aside for the use of the party of the second part shall be repaired by the party causing the damage.

Third. For all loads to and from the National stock yards the party of the second part is to pay the party of the first part one (1) dollar per car in and out, inclusive of the yard charge.

Fourth. All loaded cars to and from connections requiring transfer to be transferred at the current rate.

Fifth. All cars consigned to the East St. Louis freight-house of the party of the second part to be switched to the Wiggins transfer tracks without extra charge; regular switching charges on all other cars to and from connections.

Sixth. The party of the first part to furnish track room upon which the engines of the party of the second part can be switched

and cared for, and turned as may be required; the care of such engines to be under the supervision of the party of the first part; the price for the service rendered to be agreed upon by the master mechanic of the party of the first part and the superintendent of the motive power and machinery of the party of the second part.

Seventh. For the handling of merchandise at St. Louis, Missouri, the party of the first part is to set aside as much of the
30 freight-house known as "No. 2," in St. Louis, Missouri, as may be necessary for the business of the party of the second part; for the services rendered in handling merchandise in and out through the house, including the rent of house, checking billing, loading and unloading freight, there is to be a charge at the rate of fifteen (15) cents per net ton.

Eighth. The party of the second part to pay to the party or the first part for collecting and remitting cash fifty (50) dollars per month; for the making up of reports required and for any extra clerical work, twenty-five (25) dollars per month. The amount charged for collecting and remitting cash, and for making up reports, to be revised, by agreement between the parties to this contract, if it should be ascertained hereafter that the expense is greater than the amount named.

This contract to be in force from and after the 1st day of June, A. D. 1891, and to continue for six months from that date, and to be renewed, from time to time, as desired, at the expiration thereof, if satisfactory to both parties.

In witness whereof, the parties hereto have caused the same to be executed in duplicate this 1st day of June, A. D. 1891.

TERMINAL RAILROAD ASSOCIATION OF ST. LOUIS,
By WILLIAM TAUSSING, *President.*

Attest:
[SEAL.] J. A. HANNA, *Secretary.*

CHICAGO, PEORIA AND ST. LOUIS RAILWAY COMPANY,
By WILLIAM S. HOOK, *President.*

Attest:
[SEAL.] MARCUS HOOK, *Secretary.*

(Indorsed:) Filed March 11, 1895. James T. Jones, clerk.

31 Afterwards, to wit: on the 13th day of May, in the year of our Lord one thousand eight hundred and ninety-five, came again the receiver by his solicitors, and filed in the clerk's office of said court his cross-petition, which cross-petition is as follows, to wit:

Cross-petition. Filed May 13, 1895.

In the Circuit Court of the United States for Southern District of Illinois.

THE MERCANTILE TRUST COMPANY OF New York
vs.
THE CHICAGO, PEORIA & ST. LOUIS RAILway Company *et al.*
} Consolidated. In Equity.

Cross-petition of the receiver herein to the intervening petitions of Chicago, Milwaukee & St. Paul Railway Company, the W. W. Cargill Company, T. McMichael & Son, the S. Y. Hyde Elevator Company, the Huntting Elevator Company, Jacob Rau, Gilchrist & Company, and Henry Rippe and Carr, Ryder & Engler Company.

Your receiver further respectfully shows that the said cars and contents, in addition to being in the custody and care of said Terminal Association, were damaged and destroyed by a fire negligently cause by and originating in a spark coming from a certain engine belonging to and being operated by and in the service of the said Terminal Railroad Association of St. Louis.

Your receiver further respectfully shows unto this honorable court that all of the property mentioned in said petitions was destroyed or damaged by fire at East St. Louis during the night of October 28, 1894; that said property was at the time of said fire in the care and custody of said Terminal Railroad Association, under a contract by which said association was to give to your receiver terminal facilities at East — Louis; that according to the terms of said contract said Terminal Association undertook to handle your receiver's trains, care for his engines and cars, and handle and care for his freight, including the property mentioned in said intervening petitions; a copy of which contract is attached hereto and prayed to be made a part hereof; that under the terms of said contract and in accordance with the custom that has been in force for the last four years, it became and was the duty of said

32 Terminal Association to exercise due care and caution in the safe keeping and handling of said cars and contents mentioned in said intervening petitions, while in the custody and control of the same; but unmindful thereof and of its duty in the premises, the said Terminal Association wilfully and negligently stored the said property in close proximity to a certain load of baled hay, which hay was fired by sparks from a certain passing switch-engine belonging to and then in the service of the said Terminal Association, which fire was communicated to the building, and so to the property mentioned in said intervening petitions.

Your receiver respectfully represents unto this honorable court that on February 21, 1895, the said petitioner, Carr, Ryder & Engler Company, on January 29, 1895, the said petitioner, Chicago, Milwaukee & St. Paul Railway Company, and on January 26, 1895, each and all of the other aforesaid petitioners, exhibited their intervening petitions in this honorable court, filed in the above-entitled cause, averring respectively that they had delivered certain freight to your receiver through various other lines of railroad for certain specified destinations; that such freight had been received by your receiver and transported as far as East St. Louis; that while in the possession and control of your receiver said freight was damaged or wholly destroyed by fire on the evening of October 28, 1894; that the value of such freight was a certain fixed sum of money, respectively set out in each of the said petitions, and finally praying that this receiver be decreed to pay to each of the said petitioners the amount claimed in their said petitions for the destruction of said freight and cars, and that the same may be declared a prior and paramount lien on the property of the Chicago, Peoria & St. Louis Railway Company, now being operated by this honorable court through this receiver.

Your receiver further respectfully shows unto this honorable court that after the delivery of the said cars and their contents to this receiver, and before the filing of the said intervening petitions, the said cars and their contents were delivered by this receiver to the Terminal Railroad Association of St. Louis, in the due course of business; and that while in the possession and under the care of said Terminal Association, the said cars and contents were damaged or destroyed.

Your receiver further respectfully represents that by reason of the negligence of said Terminal Association, in so storing such highly combustible and inflammable goods as baled hay in a building so constructed as to be a veritable fire-trap in such close proximity to railroad tracks on which there were continually passing and repassing engines emitting sparks of fire, the conflagration of October 28, 1894, was caused, and the cars and contents mentioned in said intervening petitions were damaged or destroyed;

33 that in said conflagration, notwithstanding the fact that said Terminal Association had many cars stored side by side with those mentioned in said intervening petitions, and that the said association were enabled, and did save all of their said cars, and sustained practically no loss on account thereof, all of the said cars and contents which had been delivered by your receiver to the said association were either wholly destroyed or damaged.

Wherefore your receiver prays that a rule may be entered by this honorable court directed against the said Terminal Railroad Association of St. Louis, requiring it within a short day to be fixed by this court to show cause why it should not be made a party defendant to each of the said intervening petitions and be bound and abide by any order or decree which may be made thereon; and that Mr. James T. Jones, clerk herein, be directed to serve a copy of such

rule on the said Terminal Railroad Association of St. Louis; and your receiver will ever pray, etc.

C. H. BOSWORTH, *Receiver*,
By BLUFORD WILSON, *Solicitor*.

(Indorsed:) Filed May 13, 1895. James T. Jones, clerk.

Afterwards, to wit, on the first day of June, in the year of our Lord one thousand eight hundred and ninety-five, the following further proceedings were had in the matter of said intervening petition and entered of record, to wit:

Motion, June 1, 1895.

In the Circuit Court of the United States for Southern District of Illinois.

THE MERCANTILE TRUST COMPANY OF NEW YORK
vs.
THE CHICAGO, PEORIA & ST. LOUIS RAILWAY COMPANY *et al.*
} Consolidated. In Equity.

In the matter of the intervening petitions of the Chicago, Milwaukee & St. Paul Railway Company, the W. W. Cargill Company, T. McMichael & Son, the S. Y. Hyde Elevator Company, the Huntting Elevator Company, Jacob Rau, Gilchrist & Company, Henry Rippe, and the Carr, Ryder & Engler Company.

This cause coming on to be further heard upon the application of C. H. Bosworth, the receiver herein, for a rule on the
34 Terminal Railroad Association of St. Louis to show cause why it should not be made a party defendant to each and every one of the said intervening petitions; and the court being fully advised in the premises, upon consideration thereof, does hereby order that a rule be entered herein directed against the said Terminal Railroad Association of St. Louis requiring it to show cause on or before the 15th day of June, 1895, why it should not be made a party defendant to each and every one of the said intervening petitions filed herein; to plead, answer or demur to the same; and be bound by and abide all orders and decrees which shall be entered herein; and the clerk of this court is hereby ordered to serve the said Terminal Railroad Association with a copy of this order at once.

Afterwards, to wit, on the 15th day of June, in the year last aforesaid, came the Terminal Railroad Association of St. Louis, by its solicitors, and entered its motion in said cause, which motion is as follows, to wit:

Motion, June 15, 1895.

In the Circuit Court of the United States, Southern District of Illinois.

THE MERCANTILE TRUST COMPANY OF NEW YORK
vs.
THE CHICAGO, PEORIA AND ST. LOUIS RAILWAY COMPANY *et al.* } In Equity.

In the matter of the intervening petitions of the Chicago, Milwaukee and St. Paul Railway Company, the W. W. Cargill Company, T. McMichael & Son, the S. Y. Hyde Elevator Company, the Huntting Elevator Company, Jacob Rau, Gilchrist & Company, Henry Rippe, and the Carr, Ryder & Engler Company.

The Terminal Railroad Association of St. Louis, against whom a rule was heretofore entered herein, to show cause why it should not be made a party defendant to each and every one of the aforesaid intervening petitions, expressly limiting its appearance only for the purpose of this motion, moves the court to discharge the said rule for the following, among other reasons:

1. This court has no jurisdiction over the person of the Terminal Railroad Association of St. Louis.

2. The said intervening petitions are filed against C. H.
35 Bosworth in his capacity of receiver of the Chicago, Peoria and St. Louis railway, and is not a party to the main suit.

3. The Terminal Railroad Association of St. Louis is not a party to the main suit.

4. The intervening petitions aforesaid, as appears from the same, seek to recover from C. H. Bosworth, as receiver of the Chicago, Peoria and St. Louis railway, damages sustained by reason of acts and transactions of said receiver in carrying on the business connected with the property committed to his possession, as such receiver, and in which controversy the Terminal Railroad Association of St. Louis is interested.

5. The Terminal Railroad Association of St. Louis cannot lawfully be called into court as a defendant by the entry and service of a rule.

6. There is no allegation, direct or indirect, in any of the said intervening petitions, justifying any action against the Terminal Railroad Association of St. Louis.

7. The complainants in said interventions have not elected to proceed against the Terminal Railroad Association of St. Louis, and there is no right or authority existing in the defendant C. H. Bos-

worth to call this association into court, as a defendant to said petitions.

8. Said interventions present one issue, viz: Is Bosworth, receiver, liable to the intervenors, and if a new defendant is brought in, no judgment, order or decree can be entered against such new defendant on the pleadings.

9. The method adopted by the receiver to bring in a new defendant is contrary to the established and well-understood practice in chancery, is illogical, irregular and not sanctioned by law.

Wherefore and for other good reasons, the said rule ought to be discharged.

SAMUEL P. WHEELER,
Solicitor for Terminal R. R. Ass'n.

(Indorsed:) Filed June 15, 1895. James T. Jones, clerk.

36 Afterwards, to wit: on the 27th day of August, in the year last aforesaid, came again the parties in the above-entitled cause, by their solicitors, and filed in said cause the following stipulation, to wit:

Stipulation, Aug. 27, 1895.

In the Circuit Court of the United States in and for the Southern District of Illinois.

THE MERCANTILE TRUST COMPANY OF NEW York, Complainant,
vs.
CHICAGO, PEORIA & ST. LOUIS RAILROAD Company, Defendant.
} Consolidated Cause.

In the matter of the intervening petition of the Carr, Ryder & Engler Company, Chicago, Milwaukee & St. Paul Railway Company, the S. Y. Hyde Elevator Company, the W. W. Cargill Company, Jacob Rau; James N. Gilchrist and Colin F. Bell, partners under the firm name of Gilchrist & Company; the Huntting Elevator Company, and Thomas McMichael & William McMichael, under the firm name of McMichael & Son, and Henry Rippe.

For the purpose of saving the labor and expense of making proof thereof it is stipulated by the parties to these proceedings, as follows, to wit:

1. That the petitioner, Carr, Ryder & Engler Company, is a corporation, as alleged, having its place of business at the city of Dubuque, Iowa, and that on the 20th day of October, 1894, it delivered to the Chicago, Milwaukee & St. Paul Railway Company, at said Dubuque, the property mentioned in its petition filed herein, which property was consigned to May & Thomas Hardware Company, Birmingham, Alabama, by way of East St. Louis, Illinois, and was loaded in a car of the Rock Island and Peoria Railway Company, No. 1004, and was to be transported to destination, pursuant to the bill of lading issued therefor, which bill of lading is attached to this stipulation, marked Exhibit "A," and is made part hereof; that while said property was in transit it was destroyed by fire at East St. Louis on the evening of the 28th of October, 1894; that at the time it was so destroyed the said petitioner was the owner thereof; that said property so destroyed was of the value of seven hundred seventy-seven dollars and $\frac{28}{100}$ ($777.28), and that said petitioner was damaged in said sum of $777.28 on account of
37 said property having been so destroyed, and that the petitioner is entitled to recover that amount, with interest, if it shall be adjudged that it is entitled to recover in this proceeding.

2. That the Chicago, Milwaukee and St. Paul Railway Company is a corporation, as alleged, having its principal office at the city of Milwaukee, Wisconsin; that on the 28th day of October, 1894, it was the owner of thirty-eight (38) cars mentioned and described in its petition on file herein; that during the evening of said 28th day of October the said cars while on the tracks of the Terminal Railroad Association of St. Louis, in its yard at East St. Louis, commonly

used by the receiver herein under the agreement between said association and the Chicago, Peoria & St. Louis Railway Company, dated August 1, 1892, were damaged by fire at East St. Louis, in the State of Illinois; that each one of said cars was consigned as per bills of lading and waybills introduced in evidence; that the amount of damage to each of said cars, except car No. 12, is as stated in the petition of said company, under the heading "Net loss & salvage," and that the total amount of damage to said cars is $9,033.73, which amount the Chicago, Milwaukee & St. Paul Railway Company is entitled to recover, if it shall be adjudged that it is entitled to recover in this proceeding.

3. That said petitioner, the W. W. Cargill Company, is a corporation, as alleged, and that at the dates and times, and at the place in its petition mentioned, it delivered to the Chicago, Milwaukee & St. Paul Railway Company four (4) car-loads of barley in cars, as stated in its petition, consigned to the Teichman Commission Company, St. Louis, Missouri, via East St. Louis, Illinois. That receipts, of which Exhibits "B," "C," "D" and "E" attached to this stipulation are copies, were given by said railway company at the times said barley was received by it for transportation. That said barley was destroyed by fire at said East St. Louis during the night of October 28, 1894; that said barley at the time it was so destroyed belonged to the petitioner, and was of the value of twelve hundred and fifty-three dollars and $\frac{53}{100}$ ($1,253.53). That the petitioner was damaged in that sum, and is entitled to recover that amount, and interest, if it shall be adjudged that it is entitled to recover in this proceeding.

4. That the petitioner, The S. Y. Hyde Elevator Company, is a corporation, as alleged, and that at the dates and times and at the places in its petition mentioned, it delivered to the Chicago, Milwaukee and St. Paul Railway Company six (6) car-loads of barley, in cars as stated in its petition, consigned to the Teichman Commission Company, St. Louis, Missouri, via East St. Louis, Illinois; that receipts the same in form as Exhibits "B," "C," "D" and
38 "E" attached to this stipulation were given by said railway company at the time said barley was received by it for transportation; that said barley was destroyed by fire at East St. Louis during the night of October 28, 1894; that said barley at the time it was so destroyed belonged to the petitioner, and was of the value of two thousand one hundred and fifty-four dollars and $\frac{53}{100}$ ($2,154.53); that the petitioner was damaged in that sum and is entitled to recover that amount, and interest, if it shall be adjudged that it is entitled to recover in this proceeding.

5. That the petitioner, Jacob Rau, of Wykoff, Minnesota, at the dates and times and at the place in his petition mentioned, delivered to the Chicago, Milwaukee and St. Paul Railway Company two (2) car-loads of barley in cars as stated in his petition, consigned to the Orthwein Grain Company, St. Louis, Missouri, by way of East St. Louis, Illinois; that receipts, the same in form as Exhibits "B," "C," "D" and "E" attached to this stipulation, were given him by said railway company at the time said barley was received for transportation; that said barley was destroyed by fire at East St. Louis,

during the night of October 28, 1894; that said barley, at the time it was so destroyed, belonged to the petitioner, and was of the value of eleven hundred forty-four dollars and $\frac{7}{100}$ ($1,144.07); that the petitioner was damaged in that sum, and is entitled to recover that amount, and interest, if it shall be adjudged that it is entitled to recover in this proceeding.

6. That the petitioners, James N. Gilchrist and Colin F. Bell, are partners under the firm name of Gilchrist & Company, engaged in business at McGregor, Iowa, and that at the dates and times, and at the place in their petition mentioned, they delivered to the Chicago, Milwaukee and St. Paul Railway Company two (2) car-loads of barley in cars as stated in their petition, consigned to the Teichman Commission Company, St. Louis, Missouri, by way of East St. Louis, Illinois; that receipts the same in form as Exhibits "B," "C," "D" and "E" attached to this stipulation, were given to them by said railway company at the time said barley was received for transportation; that said barley was destroyed by fire at East St. Louis during the night of October 28, 1894. That the said barley at the time it was so destroyed belonged to the petitioners, and was of the value of eight hundred and five dollars ($805.00); that the petitioners were damaged in that sum, and are entitled to recover that amount and interest, if it shall be adjudged that they are entitled to recover in this proceeding.

7. That the petitioner, The Huntting Elevator Company, is a corporation, as alleged, and that at the dates and times and at the places in its petition mentioned, it delivered to the Chicago, Milwaukee & St. Paul Railway Company ten (10) car-loads of barley in cars, as stated in its petition, consigned to the Teichman Commission Company, St. Louis, Missouri, by way of East St. Louis,
39 Illinois; that receipts, the same in form as Exhibits "B," "C," "D" and "E," attached to this stipulation, were given to it by said railway company at the time said barley was received for transportation; that said barley was damaged and destroyed by fire at East St. Louis during the night of October 28, 1894; that said barley, at the time it was so damaged and destroyed, belonged to the petitioner, and the loss and damage thereof amounted to the sum of twenty-six hundred dollars and $\frac{56}{100}$ ($2,600.56); that the petitioner was damaged in that sum, and is entitled to recover that amount, if it shall be adjudged that it is entitled to recover in this proceeding.

8. That the petitioners, Thomas McMichael and William McMichael, are partners engaged in business at McGregor, Iowa, under the firm name of T. McMichael & Son, as alleged, and that at the dates and times, and at the place in their petition mentioned, they delivered to the Chicago, Milwaukee and St. Paul Railway Company eight (8) car-loads of barley in cars as stated in their petition, consigned to the Teichman Commission Company, St. Louis, Missouri, by way of East St. Louis, Illinois. That receipts the same in form as Exhibits "B," "C," "D" and "E," attached to this stipulation, were given to them by said railway company, at the time said barley was received for transportation; that said barley was de-

stroyed by fire at East St. Louis during the night of October 28, 1894; that said barley at the time it was so destroyed belonged to the petitioners, and was of the value of twenty-nine hundred and forty-two dollars and $\frac{56}{100}$ ($2,942.56); that the petitioners were damaged in that sum, and are entitled to recover that amount, with interest, if it shall be adjudged that they are entitled to recover in this proceeding.

9. That the petitioner, Henry Rippe, of Fairmount, Minnesota, at the dates and times, and at the place in his petition mentioned, delivered to the Chicago, Milwaukee & St. Paul Railway Company two (2) cars of barley in cars, as stated in his petition, consigned to the Orthwein Grain Company, St. Louis, Missouri, by way of East St. Louis. That receipts, in form as Exhibits "B," "C," "D" and "E," attached to this stipulation, were given him by said railway company; that said barley was destroyed by fire at East St. Louis during the night of October 28th, 1894; that said barley at the time it was so destroyed belonged to said Rippe, and was of the value of $1,165.67, and that he is entitled to recover that amount and interest, if it shall be adjudged that he is entitled to recover in this proceeding.

Dated August 27th, 1895.

BURTON HANSON &
GEORGE P. CARY,
Attorneys for Petitioners.
BLUFORD WILSON,
Solicitor for Receiver.

40

Receipts of C., M. & St. P. Ry. Co.

41

EXHIBIT "B."

No. ..... *Station*... LA CROSSE. Oct. 20, 1894.

RECEIVED from W. W. CARGILL CO.

in apparent good condition

MARKS AND CONSIGNEE.	DESCRIPTION OF PROPERTY.	WEIGHT
Teichman Com. Co. St. Louis, Mo. Car 15254 Exhibit B.	Via E. St. Louis. Bulk Barley.	

As described above, contents and value unknown, to be transported by the CHICAGO, MILWAUKEE & ST. PAUL RAILWAY CO., over the line of this Railroad to ..... ready to be delivered at said warehouse, to the consignee or their warehouse at .....

owner, and if the same are consigned to any point beyond the line of this Company's road ready to be delivered at said warehouse, to the next connecting company or carrier, it being expressly agreed that said property is to be transported upon and to all respects subject to the regulations of the published tariff of said company and to the conditions printed and endorsed hereon, which regulations and conditions form a part of this contract, and the acceptance of this contract is to be deemed evidence of notice of all such regulations and conditions to and of assent thereto by the shipper, consignee and owner of said property, and it being further expressly agreed that this Company assumes no liability, and is not to be held responsible as common carriers, for any loss of, or injury to said property, after its arrival at its warehouse aforesaid, or for any loss or damage thereto or any delay in transportation or delivery thereof by any connecting or succeeding company or carrier.

(OVER)

J. C. HEITBAHN, Agent.

CONDITIONS AND RULES

FORMING PART OF THE WITHIN CONTRACT.

1. The Corporation will not receive or carry any Bank Bills, Drafts, Notes, Bonds, Contracts, evidences of property, or other assets of the Corporation, is authorized to take charge of Bank Book, Money or other valuable papers or things, for or on account of any company, or to receive any peculiarities or rewards, for handling or transporting any such articles.

2. No Gold or Silver Coin or unmanufactured articles of gold and silver, or Jewelry, Watches, Plated Articles, Stationary, Musical Instruments, Glass, Silks, Laces, will be carried by the Corporation, for the use of which it will be required the character and kind of articles shall be specified in the bills of lading, and unless the proper extra price for the carriage and responsibility for such articles be paid.

Carriages and Sleighs, Show Cases, Machinery, Stoves and Castings, Marble, Looking Glasses, Mirrors, Pictures, Furniture, Glass, Glass and Crockery, Cabinet Ware and Furniture will only be taken at the owner's risk of breakage or injury during the course of transportation, and the loading and unloading thereof. Any description will be taken only on special terms and

1754

POOR COPY

36

Receipts of C., M. & St. P. Ry. Co 41

42

EXHIBIT C.

No.....

Station... LA CROSSE, Oct. 18, 1894.

RECEIVED from W. W. CARGILL CO.

in apparent good condition.....

MARKS AND CONSIGNEE	DESCRIPTION OF PROPERTY	WEIGHT
Teichman Com. Co. St. Louis, Mo. Via E. St. Louis. Exhibit "C."	Barley Cars 2452–20186. 30500–12856–9630. 47654–9168–1100.	

As described above, contents and value unknown, to be transported by the CHICAGO, MILWAUKEE & ST. PAUL RAILWAY CO., over the line of this Railroad to their warehouse at.....ready to be delivered at said warehouse, to the consignee or owner, and if the same are consigned to any point beyond the line of this Company's road ready to be delivered at said warehouse, to the next connecting company or carrier, it being expressly agreed that said property is to be transported upon and in all respects subject to the regulations of the published tariff of said company and to the conditions printed and endorsed hereon, which regulations and conditions form a part of this contract, and the acceptance of this contract is to be deemed evidence of notice of all such regulations and conditions to and of assent thereto by the shipper, consignee and owner of said property; and it being further expressly agreed that this Company assumes no liability, and is not to be held responsible as common carriers, for any loss of, or injury to said property, after its arrival at its warehouse aforesaid, or for any loss or damage thereto or any delay in transportation or delivery thereof by any connecting company or carrier

(OVER.)

J. C. HEITBAHS, Agent.

CONDITIONS AND RULES

FORMING PART OF THE WITHIN CONTRACT.

1. The Corporation will not receive or carry any Bank Bills, Drafts, Notes, Bonds Coupons, evidences of property or other writings, or be responsible for their loss or injury.

2. No Conductor, or other agent of the Corporation, is authorized to take charge of Bank Notes, Money or other valuable property for the Company, or to receive or carry the same, unless by the express consent of the Company, or for such articles.

3. No Gold or Silver Coin or Bullion, or manufactured articles of gold and silver, or Jewelry Watches, Pictures, Plated Articles, Statuary, Musical Instruments, Glass, Silks, Laces, will be carried unless the value thereof is stated in writing at the time of delivery for transportation, and the Corporation may require a memorandum in writing, stating the character and kind of articles and their value, and unless the proper extra price for the carriage and responsibility for such articles be paid.

4. Articles will not be received for transportation unless properly packed in suitable Cases Boxes, Bales or Packages, and each must be well and clearly Marked with the name of the Consignee, the place to which and the route by which they are to be carried, and the name of the Consignor, the whole case or damage for loss or mismarkings will be paid. The Company will in no case be responsible for loss, injury or damage which might have been avoided by skillful and proper care on the part of the agents. All property is subject to inspection when necessary.

Goods in bundles will not be considered as properly packed, and the Company will not be responsible for any loss of parts or of the pilings of such packages.

No allowance for deficiency of Lemons, Oranges or other fruit, if not covered with canvas will be made.

5. The Corporation will not be responsible for damages occasioned by delays from storms, accidental or unavoidable causes; or by decay or injury to fruit, fish, dressed hogs, dressed poultry or other perishable property, or from injury to property packed in ice, or for delay in the delivery of such property, or for the non-delivery of such property in any certain time, nor in the time for any particular market.

The charges on lettered marble must always be prepaid.

The charges on perishable property must always be prepaid.

7. The Corporation will not undertake or agree to carry property by any particular train, nor in time for any particular market, nor will they, if they will forward the same with as reasonable dispatch as the general business of the Corporation will permit.

8. The Corporation will only be liable as warehousemen, after the property has been placed in their Public Depot, and will not be liable as to property by fire, while in their freight depot or upon their platforms.

9. Storage, at customary rates, will be charged for all property not taken from the warehouse within one day after arrival.

10. The Corporation will not be responsible for loss or injury happening to or occasioned by animals in consequence of their viciousness, or for loss or injury happening to or occasioned by overloading the same, nor for any damages however caused, to live stock or animals of any description, transported or carried upon their railway, or in their cars or vehicles.

11. The Corporation will not be responsible for loss or damage to any article by fire or otherwise, the title of which resident is extremely liable of the Company's line of road, or in any point or place beyond, or to which it may be forwarded with as reasonable dispatch as the general business of the Corporation at its warehouse within mentioned, will admit, by whatever or freight train or vessel the same may be carried, whether such loss or damage happen by the act, default or negligence of the Corporation, its servants or agents, or otherwise howsoever, and whether the same occasionally, for transportation, the Company acting for the purpose of delivery to such carrier or freight-man, as the agents of the consignee or consignor, and not as carriers. The Company will not be responsible for any loss or damage to any article by fire or otherwise, after the same shall have arrived at the within mentioned Company's station for delivery to the consignee or to the connecting carriers or freight-men for transportation.

12. No outside agent or clerk has authority to alter or vary any of these Rules and Conditions. All claims for damages must be made in writing to the Company at the station of delivery within ten days after the property has been delivered, and before the property has become mixed with other property, and before any change has been made in the car containing the same, and before the car containing the same has been loaded with freight for any other station, and before the property has been removed from the depot or warehouse where delivered, and before the expiration of 72 hours after the property has been delivered, and after the expiration of 72 hours this Company shall be at liberty to sell the property to pay charges, and all claims for damages must be presented in writing to the Company at the station of delivery

1755

37

42

Receipts of C., M. & St. P. Ry. Co.

43

EXHIBIT D.

Station... LA X, WIS., Oct. 10 12, 1894.

No......

RECEIVED from W. W. CARGILL CO.

in apparent good condition.....

MARKS AND CONSIGNEE	DESCRIPTION OF PROPERTY	WEIGHT
Teichman Com. Co. St. Louis, Mo.	Cars { 20022—St. P. Bly. { 32986 " "	41100 40400

Duplicate.

Exhibit "D."

As described above, contents and value unknown, to be transported by the CHICAGO, MILWAUKEE & ST. PAUL RAILWAY CO., over the line of this Railroad to their warehouse at..... ready to be delivered at said warehouse, to the consignee or owner, and if the same are consigned to any point beyond the line of this Company's road ready to be delivered at said warehouse, to the next connecting company or carrier, it being expressly agreed that said property is to be transported upon said in all respects subject to the regulations of the published tariff of said company and to the conditions printed and endorsed hereon, which regulations and conditions form a part of this contract, and the acceptance of this contract is to be deemed evidence of notice of all such regulations and conditions to and of assent thereto by the shipper, consignee and owner of said property, and it being further expressly agreed that this Company assumes no liability and is not to be held responsible as common carriers, for any loss of, or injury to said property, after its arrival at its warehouse aforesaid, or for any loss of or damage thereto or any delay in transportation or delivery thereof by any connecting or succeeding company or carrier.

(OVER.)

J. C. HEITBAHN, Agent

CONDITIONS AND RULES

FORMING PART OF THE WITHIN CONTRACT.

1. The Corporation will not receive or carry as ... Bank Bills, Bonds, Deeds, Contracts or Papers of any description whatever without special written agreement for their loss or delivery.

2. No Conductor, or other agent of the Corporation, is authorized to, [illegible] charges of Bank Notes, Money or other valuable packages, unless the value thereof is plainly expressed on the face of the receipt, and the same paid or agreed for by the Consignor, on or for such article.

3. No Gold or Silver Coin or Bullion, or manufactured articles of gold and silver, or Jewelry Watches, Pictures, Picture Articles, Statuary, Musical Instruments, unless with such articles carried by the Corporation delivered a memorandum in writing stating the character and value of such articles and their value, and unless the proper extra price for the carriage and responsibility for such articles be paid.

Carriages, Pianos, Sewing Machines, Show Cases, Machinery, Stoves and Castings, Marble, Looking Glasses, Mirrors, Glass, Paintings, Pictures, all Liquids, and all articles liable to breakage, leakage, chafing, Furniture will only be taken at the owner's risk of breakage, unless specially agreed to in writing.

Explosive, inflammable and combustible articles of any description will be taken only on special terms and rates. If found secreted among other goods they will be liable to forfeiture, and the owner or consignee will be held responsible for all damage in consequence of the same being so secreted. [illegible]

4. Articles will not be received for transportation unless properly packed in suitable Cases, Boxes Baskets or Packages, and each must be well and securely fastened, otherwise they will not be received. And while care in damage for loss or misdelivery will be paid. Their contents will in no case be responsible for loss, injury or damage arising without the negligence or fault of the Company or its agents. All property is subject to stoppage when necessary.

Goods in bundles will not be considered as properly packed, and the Company will not be responsible for any loss of parts or of the whole of such goods.

No allowance for deficiency of Leakage, Breakage or other Perils, if not covered with customs will be made.

5. The Corporation will not be responsible for damage occasioned by delays from storm accidents or unavoidable causes, by fire or injury to Property, by the dangers of River, Lake or the elements, or other jurisdiction [illegible] nor liable for the non-delivery of such property in any other time, than in the time for any particular article.

The charges on lettered marble must always be prepaid.

The charges on perishable property must always be prepaid.

6. The Corporation will not receive Valuable property, [illegible] unless contracted for in writing, nor will it be responsible for any loss or damage arising from or in the delay of shipment, however occasioned, but they will forward with diligence with as reasonable dispatch as the general business of the Corporation will permit, after the property has been placed in the depot.

8. The Corporation will only be liable for damage to property by fire, while in their freight depot or warehouse, the Company will not be liable.

The charges on lettered marble must always be prepaid.

9. Storage, at customary rates, will be charged for all property not taken from the warehouse within one day after arrival.

10. The Corporation will not be responsible for loss or injury happening to or occasioned by [illegible] or other animals, however occasioned, but they will forward with diligence with as reasonable dispatch as the general business of the Corporation will permit, after the property has been placed in the depot.

11. Goods or property consigned to any place of the Company's line of road, or to any point or place beyond its termini, will be sent forward only on the usual days and hours for the regular business of the Corporation, known to the station agent at said warehouse willing to receive the same unconditionally, for transportation, the Company acting for the purpose as carriers. The carrier or company shall be liable for any loss, damage or injury to property after the same shall have arrived at the within mentioned warehouse, and notice given for delivery to the consignee or to the consignee's clerk has authority to alter or vary any of these Rules and Conditions.

12. No goods or property shall be subject to a minimum charge for tracking and rental of $1.00 per car for each 24 hours, detention or fractional part thereof after the expiration of 48 hours time to unload, after notice of arrival has been given to consignee, and after the expiration of 48 hours from arrival at destination, such as a warehouse or the cars or vehicle and delivery to a warehouseman, and the consignee or [illegible] shall pay the C., M. & St. P. Ry. Company the regular Drayage charges, the said warehouseman or the said Railway Company shall have a lien upon the freight in addition to the car [illegible] charges and back charges.

1756

38

44 EXHIBIT "E."

No.....

Station, LA X, WIS., Oct. 16, 1894.

RECEIVED from W. W. CARGILL CO.

in apparent good condition.....

MARKS AND CONSIGNEE.	DESCRIPTION OF PROPERTY		WEIGHT
L. Lemcke & Co.	St. P.	17272	40650
St. Louis, Mo.	M. & N	1232	50400

Duplicate.

Exhibit E.

As described above, contents and value unknown, to be transported by the **CHICAGO, MILWAUKEE & ST. PAUL RAILWAY CO.**, over the line of this Railroad to their warehouse at .... ready to be delivered at said warehouse, to the consignee or owner, and if the same are consigned to any point beyond the line of this Company's road ready to be delivered at said warehouse, to the next connecting company or carrier, it being expressly agreed that said property is to be transported upon and in all respects subject to the regulations of the published tariff of said company and to the conditions printed and indorsed hereon, which regulations and conditions form a part of this contract, and the acceptance of this contract is to be deemed evidence of notice of all such regulations and conditions to and of assent thereto by the shipper, consignee and owner of said property, and it being further expressly agreed that this Company assumes no liability, and is not to be held responsible as common carriers, for any loss of, or injury to said property, after its arrival at its warehouse aforesaid, or for any loss or damage thereto or any delay in transportation or delivery thereof by any connecting or succeeding company or carrier.

(OVER.)

J. C. HEITBAHN, Agent.

CONDITIONS AND RULES

FORMING PART OF THE WITHIN CONTRACT.

1. The Corporation will not receive or carry any Bank Bills, Drafts, Notes, Bonds Certificates, evidences of property or other writings, or be responsible for their loss or value, unless the charges of Bank Note Detectors, or other agents of the Corporation to examine the same, be paid in addition to the charge of Bank Note Detector or Reward, for himself or for the Company, on or for such articles.

2. No Conductor, or other agent of the Corporation, is authorized to receive any Gold or Silver in Bullion, or manufactured articles of gold and silver, or Jewelry, Watches, Pictures, Plated Articles, Glassware, Musical Instruments, Silks, Laces, Embroideries, Cloths, Clothing, Furs, Hats, Caps, Boots, Shoes, Rubbers, Leather and Leather Goods, Which it will be responsible, unless with such articles when delivered, is also delivered a memorandum in writing stating the character and kind of articles and their value, and unless the proper extra price for the carriage and responsibility on such articles is paid.

3. Carriages and Sleighs, when taken, Machinery, stoves and castings, Marble, Looking Glasses, Mineral Acids, Sweet Potatoes, all Liquids put up in glass or earthenware, Fabrics Water and Furniture will only be loaded and unloaded at the risk of the owner, and the Company will not be responsible for breaking thereof, unless special agent is employed to the contrary.

4. Gunpowder and combustible articles of any description will be taken only on special terms and rates. If found secreted among other goods they will be taken from the cars and stored in the depot at the risk of the owner thereof.

5. Articles will not be received for transportation unless properly packed in suitable cases, Boxes, Bales or Packages, and each such case, box, bale or package is marked with the name of the Consignee, and of the Station to which it is to be forwarded, and the name of the consignor, and all such packages must be distinctly marked with the name of the consignee, and the name of the station to which they are to be forwarded, and the name of the consignor, and no one will be responsible for loss, injury or damage which might have been avoided by a skillful and more careful and sufficient packing, or marking, or which arises from the nature of the property or defect of the package. Goods in bundles will not be considered as properly packed, and the company will not be responsible for any loss of parts or of the whole of such packages.

No allowance for delivery of Lemons, Oranges or other fruit, if not covered with canvas will be made.

6. The Corporation will not be responsible for delays occasioned by storms, floods, accidents, or other causes beyond its control, nor for any loss or damage arising from any delay or stoppage, however occasioned, but they will forward the same with as reasonable dispatch as the general business of the Corporation will permit.

7. The Corporation will not be responsible for any loss or damage to property, by particular train, nor in time for any particular market, nor are they to be responsible for loss or damage arising from any delay or stoppage, however occasioned, but they will forward the same with as reasonable dispatch as the general business of the Corporation will permit.

8. The Corporation will not be responsible for any loss or damage to property after the property has been placed in their depot, or upon the platform of the depot ready for delivery, whether notice has been given or not. But for loss or damage to property by fire, while in their freight depot or warehouse, the Company will not be liable.

9. Storage, at customary rates, will be charged for all property not taken from the warehouse within one day after arrival.

10. The Corporation will not be responsible for loss or injury happening to or occasioned by receiving, transporting, delivering, storing, or keeping live stock or animals of any description, transported or carried upon their railway, or in their cars or vehicles.

11. The Corporation will not be responsible for the loss of, or damage to any article by fire or other wise, in the Grounds or Warehouses of the Company, unless the same be caused by its negligence.

12. Goods will be received and carried to any place on the Company's line of road, or to any point or place beyond its terminus, will be sent forward with as reasonable dispatch as the general business of the Corporation at its aforesaid stations will admit of, but they are not to be held responsible for any damage however caused to live stock or animals of any description, transported or carried upon their railway, or in their cars or vehicles.

13. No station agent or clerk has authority to alter or vary any of these Rules and Conditions

All cartload freight shall be subject to a minimum charge for trucking and hauls of 40 cts per car. Freight will be delivered at the warehouse of the consignee, free of charge, within 24 hours after arrival at destination, and after the expiration of 72 hours, the Company shall be entitled to collect and store the freight in a warehouse as often as it shall see fit, and deliver it to warehouseman, to hold for the consignee, and the Company shall have a lien upon the freight for storage and warehousing same, and for such expense this company may have a lien upon the freight in addition to its own freight charges and such charges.

EXHIBIT A.

45

Form 187.

CHICAGO, MILWAUKEE & ST. PAUL RAILWAY CO.

ALL RAIL

THROUGH FAST FREIGHT LINE.

BONDED.

J. H. HILAND, General Freight Agent, Chicago.

No ..... Dub 11/20 1894.

Received from Carr R. & B. Co Oct 24 94

in apparent good order by the CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, the following described packages marked and numbered as per marginal entry, subject to the conditions and regulations of the published tariffs of said Company, to be transported over the line of this Railroad to ..... a company or carrier [illegible] the same not to be forwarded beyond the limits of the ..... and delivered after payment of freight or bills ... and order to ..... at the company's depot, at which the same are to be delivered to the consignee; but this Company guarantees that the rate of freight for the transportation of said packages shall not exceed rates noted as charges of this Bill of Lading and charges advanced by this Company: Provided contents of packages are correctly stated in Railroad Receipts (original and duplicate) on which this Bill of Lading is based, subject to the following conditions:

This Company shall not be responsible for the loss of packages or contents which are unknown, or for leakage of any kind of Liquids, breakage of any kind of Glass, Carboys of Acid or Articles packed in Glass, Stoves or Stove Furniture, Carriages, Pottery, Cordage, Furniture, Show Cards, Engravings and Paintings, Machinery and Castings, Hay, Hemp, Cotton or any article whose bulk renders it necessary to transport in open cars, or for damage to perishable property, or for loss or damage by fire, or for loss or damage by the elements, or for loss of weight of Grain, or Coffee in bags, or Rice in casks, nor for loss from Rust, Heat, or Fumes, or Outgrown hoops, nor covered by Canal, or for damage of any kind, or for any

45 Afterwards, to wit: on the 4th day of September, in the year last aforesaid, came again the intervenors by their solicitors, and filed in the above-entitled cause the following notice to file replication, and replication, to wit:

Notice. Filed Sept. 4, 1895.

In the Circuit Court of the United States for Southern District of Illinois.

THE MERCANTILE TRUST COMPANY OF NEW YORK
vs.
THE CHICAGO, PEORIA & ST. LOUIS RAILWAY COMPANY *et al.* } In Chancery.

To Messrs. Bluford Wilson and P. B. Warren, solicitors for the Chicago, Peoria & St. Louis Railway Company:

Take notice that we will, on Wednesday at 2 p. m., or as soon thereafter as counsel can be heard, in the court-room of Judge Allen, in the Federal court building, in Springfield, Illinois, move said court for leave to file the replications of the intervening petitioners herein, as of the 15th day of March, a copy of which replication is hereto attached.

You may appear at that time if you see fit.

BURTON HANSON,
GEORGE P. CARY,
Solicitors for Intervening Petitioners.

Dated September 4, 1895.

Received copy of the above notice and attached replication.
Sept. 4, 1895.

BLUFORD WILSON,
P. B. WARREN,
Solicitors for Defendant Railway Company.

Replication.

In the Circuit Court of the United States for the Southern District of Illinois.

THE MERCANTILE TRUST COMPANY OF NEW YORK
vs.
THE CHICAGO, PEORIA & ST. LOUIS RAILWAY COMPANY *et al.* } In Chancery.

The Replication of the Chicago, Milwaukee & St. Paul Railway Company, W. W. Cargill Company, T. McMichael & Son,
46 S. Y. Hyde Elevator Company, Huntting Elevator Company, Jacob Rau, Gilchrist & Company, Henry Rippe, and Carr, Ryder & Engler Company.

Replication. Filed Sept. 4, 1895.

Intervening petition to the answer of the Chicago, Peoria and St. Louis Railway Company.

The repliants, saving and reserving to themselves, now and at all times hereafter, all and all manner of benefit and advantage of ex-

ception, which can or may be had or taken to the manifold insufficiencies of said answer of the said defendant, for replications thereunto, say: that they will aver, maintain and prove their intervening petitions to be true, certain and sufficient in the law, to be answered unto; and that the said answer of the said defendant is uncertain, untrue and insufficient to be replied unto by these repliants, without this; that any other matter or thing whatsoever, in the said answer contained, material or effectual in the law, to be replied unto, and not herein and hereby well and sufficiently replied unto, confessed and avoided, traversed or denied, is true. All which matters and things these repliants are ready to aver, maintain and prove, as this honorable court shall direct, and humbly pray, as in and by their said intervening petitions have already prayed.

BURTON HANSON &
GEORGE P. CARY,
Solicitors for Intervening Petitioners.

Dated September 4, 1895.

(Indorsed:) Filed Sept. 4, 1895. Stuart Brown, M. C.

Afterwards, to wit: on the 24th day of October, in the year last aforesaid, the following further proceedings were had in said cause and entered of record, to wit:

Leave to File Amended Petition.

In the Circuit Court of the United States in and for the Southern District of Illinois.

THURSDAY, *October* 24, 1895.

Present: Hon. William J. Allen, district judge.

THE MERCANTILE TRUST COMPANY OF NEW YORK
vs.
CHICAGO, PEORIA AND ST. LOUIS RAILROAD COMPANY.

In the matter of the intervening petitions of the Carr, Ryder & Engler Company, Chicago, Milwaukee and St. Paul Railway
47 Company, the W. W. Cargill Company, Jacob Rau; James N. Gilchrist & Colin F. Bell, partners under the firm name of Gilchrist & Company; the Huntting Elevator Company, and Thomas McMichael and William McMichael, under firm name of McMichael & Son, and Henry Rippe.

Said cause coming on to be heard upon the pleadings filed herein, and the testimony heretofore taken before the master in chancery, and upon argument of counsel, and the court being fully advised in the premises, it is hereby ordered that said petitioners have leave to file an amendment to their said petitions, and that the defendant have leave to amend its answer heretofore filed in said cause to said petitions.

Dated October 24, 1895.

Afterwards, to wit: on the 18th day of November, in the year last aforesaid, came again the receiver by his solicitors and filed in the clerk's office of said court, his amended answer, which answer is as follows, to wit:

Amended Answer. Filed Nov. 18, 1895.

In the Circuit Court of the United States for Southern District of Illinois.

THE MERCANTILE TRUST COMPANY OF NEW YORK *vs.* CHICAGO, PEORIA & ST. LOUIS RAILWAY COMPANY. } Consolidated. In Equity.

In the matter of the intervening petitions of the Carr, Ryder & Engler Company, Chicago, Milwaukee & St. Paul Railway Company, the S. Y. Hyde Elevator Company, the W. W. Cargill Company, Jacob Rau, James N. Gilchrist & Company, the Hunting Elevator Company, McMichael & Son, and Henry Rippe.

Amended Answer of the Receiver to the Amended Petition of the Above-named Intervenors.

Now comes the receiver herein by Bluford Wilson and P. B. Warren his solicitors, by leave of court first had and obtained, and restates all the denials, admissions and averments contained in the answer of this receiver filed to the respective intervening petitions of the above-named petitioners on the 11th day of March, 1895, and for answer to the amended petitions filed by the above-named intervenors on the 24th day of October, 1895, and now and at all times hereafter saving to himself all benefit and advantage of exception or otherwise, to the many errors, uncertainties and
48 other imperfections in the said amended petitions contained, for answer thereunto this receiver says:

That he expressly denies that upon the arrival of the cars mentioned and described in said petitions at East St. Louis, and while the same were still in the *petition* of this defendant, this defendant negligently caused and permitted them, together with their contents to be placed upon certain tracks in close proximity to the said wooden warehouse referred to, and described in the amended petition of said intervenors.

And this receiver further expressly denies that at any time before the damage and destruction of said cars and contents he had knowledge of the character of said wooden warehouse, or that he negligently and carelessly caused or permitted said cars and their contents to be placed upon said side track near said warehouse, and that they remained thereon for several days; but this receiver avers the facts to be:

That after the delivery of the said cars and their contents to this receiver, and before the filing of the said intervening petitions, the said cars and their contents were delivered by this receiver, in the due course of business, to the Terminal Railroad Association of St.

Louis: and that while in the possession, and under the care of said Terminal Association, the said cars and contents were damaged or destroyed.

That the property mentioned in said petitions was at the time of said fire in the control, care and custody of the said Terminal Railroad Association of St. Louis, under a contract made and entered into by and between the said railroad association and the Chicago, Peoria & St. Louis Railway Company, on the 1st day of August, 1892, by which said association undertook to handle this receiver's trains, care for his engines and cars, and handle and care for his freight, including the property mentioned in said intervening petitions, a copy of which contract was introduced in evidence by the intervenors on Tuesday, August 27, 1895, before Stuart Brown, master in chancery of this court, at the taking of evidence to be used in this matter; said contract is in said record marked "Exhibit A," and reference is hereby made to the same, and the same is prayed to be taken as a part hereof.

This receiver further answering, avers that by reason of his having turned over the cars and contents mentioned in said intervening petitions to the said Terminal Railroad Association of St. Louis, that it, the said railroad association, negligently caused and permitted said cars and contents to be placed upon certain tracks in the manner set out in said amended petition; that after delivering said cars and contents to said railroad association this receiver had no control over the same, and could in no manner direct the
49 placing of said cars in the yards of said railroad association at East St. Louis with reference to their being placed in close proximity to said wooden warehouse.

This receiver further answering, avers that all of the said intervening petitioners had knowledge, through their consignees, of the condition of affairs that existed in the yards of the said railroad association prior to and at the time said cars and contents were damaged and destroyed.

This receiver further answering, avers that the cars and contents mentioned in the said intervening petitions after being placed remained in close proximity to said wooden warehouse until the same were damaged and destroyed, with the full knowledge, approval and consent of the said intervening petitioners, through their agents, their respective consignees; and in fact this remained for the convenience of said consignees, and at their risk.

Therefore this receiver denies that the petitioners are entitled to the relief or any part thereof demanded either in the original petitions or the amended petitions filed herein, and prays to be dismissed with his reasonable costs and charges in this behalf most wrongfully sustained.

BLUFORD WILSON &
P. B. WARREN,
Solicitors for Receiver.

(Indorsed:) Filed November 18, 1895. James T. Jones, clerk.

Afterwards, to wit: on the 20th day of November, in the year of our Lord one thousand eight hundred and ninety-five, came again the complainants in the above cause and filed in said court in said cause the following replication, to wit:

Replication to Amended Answer.

In the Circuit Court of the United States in and for the Southern District of Illinois.

THE MERCANTILE TRUST COMPANY OF NEW YORK, Complainant,
vs.
CHICAGO, PEORIA & ST. LOUIS RAILWAY COMPANY, Defendant.
} Consolidated Cause.

In the matter of the intervening petitions of the Carr, Ryder & Engler Company, Chicago, Milwaukee & St. Paul Railway Company, the S. Y. Hyde Elevator Company, the W. W. Cargill Company, Jacob Rau; James N. Gilchrist and Colin F. Bell, partners under the firm name of Gilchrist & Company; the Hunting Elevator Company, and Thomas McMichael & William McMichael, under the firm name of McMichael & Son, and Henry Rippe.

Replication of the Above-named Intervening Petitioners to the Amended Answer of the Receiver Herein.

These repliants, saving and reserving unto themselves all and all manner of advantage of exception to the manifold insufficiencies of the said amended answer, for replication thereunto, say:

That they will aver and prove their said amended intervening petitions to be true, certain and sufficient in law to be answered unto; and that the said amended answer of the receiver is uncertain, untrue and insufficient to be replied unto by these repliants; without this, that any other matter or thing whatsoever in the said amended answer contained, material or effectual in law to be replied unto, confessed, or avoided, traversed or denied, as true; all which matter and things these repliants are and will be ready to aver and prove as this honorable court shall direct, and humbly prays as in and by their said intervening petitions they have already prayed.

BURTON HANSON &
GEORGE P. CARY,
Attorneys to said Intervenors.

(Indorsed:) Filed November 20, 1895. James T. Jones, clerk.

Afterwards, to wit: on the 14th day of January, in the year of our Lord one thousand eight hundred and ninety-six, came again the receiver and filed in said court in said cause the following motion, to wit:

Notice and Motion.

In the Circuit Court of the United States in and for the Southern District of Illinois.

THE MERCANTILE TRUST COMPANY OF NEW York, Complainant,
vs.
CHICAGO, PEORIA & ST. LOUIS RAILROAD Company, Defendant.
} Consolidated Cause.

In the matter of the intervening petitions of the Carr, Ryder & Engler Company, Chicago, Milwaukee & St. Paul Railway Company, the S. Y. Hyde Elevator Company, the W. W. Cargill Company, Jacob Rau; James N. Gilchrist and Colin F. Bell, partners under the firm name of Gilchrist & Company;
51 the Huntting Elevator Company, and Thomas McMichael and William McMichael, under the firm name of McMichael & Son, and Henry Rippe.

To Burton Hanson and George P. Cary, solicitors for defendants:

Please take notice that, on Wednesday, the 15th day of January, 1896, we will present a motion, a copy of which is attached hereto, to his honor, Judge Allen, in his court-room, at 10 o'clock in the morning, or as soon thereafter as counsel can be heard, and ask that an order be entered thereon.

BLUFORD WILSON,
Solicitor for Receiver of the Chicago, Peoria & St. Louis Railway Company.

The above notice is hereby acknowledged this — day of January, 1896.

In the Circuit Court of the United States in and for the Southern District of Illinois.

THE MERCANTILE TRUST COMPANY OF NEW York, Complainant,
vs.
CHICAGO, PEORIA & ST. LOUIS RAILROAD Company, Defendant.
} Consolidated Cause.

In the matter of the intervening petitions of the Carr, Ryder & Engler Company, Chicago, Milwaukee & St. Paul Railway Company, the S. Y. Hyde Elevator Company, the W. W. Cargill Company, Jacob Rau; James N. Gilchrist and Colin F. Bell, partners under the firm name of Gilchrist & Company; the Huntting Elevator Company, and Thomas McMichael and William McMichael, under the firm name of McMichael & Son, and Henry Rippe.

Motion of Receiver.

Motion.

Now comes C. H. Bosworth, receiver of the Chicago, Peoria & St. Louis Railway Company, by Bluford Wilson and P. B. Warren, his

solicitors, and moves the court for leave to amend a certain stipulation entered into in the above-entitled cause on the 27th day
52 of August, 1895, by and between the solicitors of record of the respective parties, in the following particular-, to wit:

First. At page 2, beginning on the sixth line in paragraph 3, strike out the following: "That receipts of which Exhibits B, C, D and E, attached to this stipulation, are copies, were given by said railway company at the time said barley was received by it for transportation," and beginning on the eleventh line of said paragraph 3, on page 2, strike out "belonged to the petitioner, and."

Second. In paragraph 4, beginning on the second line of page 3, strike out "that receipts the same in form as Exhibits B, C, D and E, attached to this stipulation, were given by said railway company at the time said barley was received by it for transportation;" and in the said paragraph 4, on the seventh line of said page 3, strike out "belonged to the petitioner, and."

Third. On page 3, beginning on the sixth line of paragraph 5, strike out "that receipts the same in form as Exhibits B, C, D and E, attached to this stipulation, were given him by said railway company at the time said barley was received for transportation;" and on said page 3, beginning on the eleventh line of said paragraph 5, strike out "belonged to the petitioner, and."

Fourth. On said page 3, beginning in the eighth line of paragraph 6, strike out "that receipts, the same in form as Exhibits B, C, D and E, attached to this stipulation, were given to them by said railway company at the time said barley was received for transportation;" and on page 4, beginning in the fourth line of said page, strike out "belonged to the petitioners, and."

Fifth. On page 4, beginning in the sixth line of paragraph 7, strike out "that receipts, the same in form as Exhibits B, C, D and E, attached to this stipulation, were given to it by said railway company at the time said barley was received for transportation;" and on said page 4, beginning in the twelfth line of said paragraph 7, strike out "belonged to the petitioner, and."

Sixth. On page 4, beginning in the eighth line of paragraph 8, strike out "that receipts, the same in form as Exhibits B, C, D and E, attached to this stipulation, were given to them by said railway company at the time said barley was received for transportation;" and on page 5, in line two of said page, strike out "belonged to the petitioners, and."

Seventh. On page 5, beginning in the eighth line of paragraph 9, strike out "that receipts, the same in form as Exhibits B, C, D and E, attached to this stipulation, were given him by said railway company;" and on page 5, beginning in the fifteenth line of said paragraph 9, strike out "belonged to said Rippe, and."

And for grounds of said motion this receiver respectfully
53 shows unto this court that said stipulation was entered into for the purpose of saving the labor and expense of making proof thereof; that the same was prepared by the solicitor for the intervening petitioners, and was signed by your receiver's solicitor

under a misapprehension of the true facts, as the same have since developed in the progress of this cause.

That this receiver had no means, at the time said stipulation was entered into, of knowing that the allegations of the facts herein sought to be stricken out were untrue, as the same were wholly and exclusively within the knowledge of the petitioners. That when said stipulation was presented to his solicitor as a statement of true facts, he accepted it as the same by reason thereof; that the knowledge that the same were untrue has come to him through the evidence of the intervenors themselves.

And petitioner files herewith, and asks the same to be taken as a part hereof, an affidavit in support of the foregoing, and also to the further effect that this motion is not made with a view to vex or delay the said petitioners in the prosecution of their said claim; that the same is made to avoid wrong and injury to this petitioner.

C. H. BOSWORTH,
Receiver of the Chicago, Peoria and St. Louis Railway Company.

BLUFORD WILSON,
P. B. WARREN,
Solicitors for Receiver.

(Indorsed:) Filed January 14, 1896. James T. Jones, clerk.

Afterwards, to wit, on the day and year last aforesaid the receiver filed in said court in said cause, his affidavit in support of the foregoing motion, which affidavit is as follows, to wit:

Affidavit in Support of Motion.

In the Circuit Court of the United States for Southern District of Illinois.

MERCANTILE TRUST COMPANY OF NEW YORK
vs.
CHICAGO, PEORIA AND ST. LOUIS RAILWAY COMPANY.

In the matter of the intervening petitions of the Carr, Ryder & Engler Company, Chicago, Milwaukee and St. Paul Railway Company, *et al.*

UNITED STATES OF AMERICA,
Southern District Illinois, } *ss:*

Bluford Wilson, being duly sworn, on oath deposes and
54 says, that he is solicitor for C. H. Bosworth, receiver of the Chicago, Peoria and St. Louis Railway Company; that on the 27th day of August, 1895, for and in behalf of said C. H. Bosworth, he entered into a stipulation with Burton Hanson, as solicitor for the Chicago, Milwaukee and St. Paul Railway Company, and various intervening petitioners; that when he entered into said stipulation he believed it to be what it purported to be, to wit, a

statement of true facts; that inasmuch as said Burton Hanson requested him to sign the stipulation, he believed that the same was prepared by said Burton Hanson; that inasmuch as certain of the facts therein alleged were wholly within the knowledge of the clients of said Burton Hanson, this affiant, at that time, had no means of knowing that the same were untrue; that the knowledge that the said facts were untrue has come to him through the evidence of the intervenors themselves; and this affiant further deposes and says, that the motion of the receiver herein to amend said stipulation by striking out the allegations of all the facts which have developed in the progress of the trial to be untrue, is not made with a view to vex or delay the said petitioners in the prosecution of their said claims, but that the same is made to avoid a wrong and injury to the said receiver.

BLUFORD WILSON.

Subscribed and sworn to before me this 13th day of January, 1896.

P. B. WARREN,
Notary Public.

(Indorsed:) Filed January 14, 1896. James T. Jones, clerk.

Afterwards, to wit, on the 23d day of January, in the year last aforesaid, the following further proceedings were had in said court in said cause, and entered of record, to wit:

Order.

In the Circuit Court of the United States for Southern District of Illinois.

MERCANTILE TRUST COMPANY
vs.
CHICAGO, PEORIA & ST. LOUIS RAILWAY COMPANY.

In the matter of the intervening petition of the Chicago, Milwaukee and St. Paul Railway Company and others.

This cause coming on to be further heard upon the motion of the receiver in the above-entitled cause, for leave to amend a certain stipulation entered into between the parties thereto on the 27th day of August, 1895, and the court having heard argument
55 of counsel, and being fully advised in the premises, upon consideration thereof, does hereby order, adjudge and decree that the said motion of the said receiver be, and the same is hereby, granted. And the said receiver is authorized to amend the said stipulation in the particulars set out in his said motion.

And it is further ordered by the court that the petitioners and the receiver be, and they are hereby granted further time to introduce evidence in support and in rebuttal of the allegations of fact stricken out of said stipulation by this order.

Petitioners' evidence to be closed on February 7, 1896, and the receiver's evidence to be closed on February 22, 1896.

Afterwards, to wit: on the 8th day of April, in the year last aforesaid, came the petitioners, by their solicitors, and filed in said court, in said cause, the following amendment to their petitions, to wit:

Notice.

In the Circuit Court of the United States in and for the Southern District of Illinois.

THE MERCANTILE TRUST COMPANY OF NEW York, Complainant, *vs.* CHICAGO, PEORIA & ST. LOUIS RAILROAD COMPANY, Defendant.	Consolidated Cause.

In the matter of the intervening petitions of the Carr, Ryder & Engler Company, Chicago, Milwaukee & St. Paul Railway Company, the S. Y. Hyde Elevator Company, the W. W. Cargill Company, Jacob Rau; James N. Gilchrist & Colin F. Bell, partners under the firm name of Gilchrist & Company; the Hunting Elevator Company, and Thomas McMichael & William McMichael, under the firm name of McMichael & Son, and Henry Rippe.

To Honorable Bluford Wilson and P. B. Warren, Esq., attorneys for the receiver of the Chicago, Peoria & St. Louis Railroad Company:

Please take notice that on the 24th day of October, A. D. 1895, at 9 o'clock in the a. m., or as soon thereafter as counsel can be heard, the above-named petitioners will apply to his honor William J. Allen, judge of said court, at his rooms in Springfield, for an order allowing and permitting said petitioners to amend their said petitions, a copy of which is attached to this notice and is hereby served upon you.

Dated October 15, 1895.

BURTON HANSON,
GEORGE P. CARY,
Attorneys for said Petitioners.

56 *Affidavit.*

In the Circuit Court of the United States in and for the Southern District of Illinois.

THE MERCANTILE TRUST COMPANY OF NEW York, Complainant,
vs.
CHICAGO, PEORIA & ST. LOUIS RAILROAD Company, Defendant.
} Consolidated Cause.

In the matter of the intervening petitions of the Carr, Ryder & Engler Company, Chicago, Milwaukee & St. Paul Railway Company, the S. Y. Hyde Elevator Company, the W. W. Cargill Company, Jacob Rau; James N. Gilchrist & Colin F. Bell, partners under the firm name of Gilchrist & Company; the Hunting Elevator Company, and Thomas McMichael & William McMichael, under the firm name of McMichael & Son, and Henry Rippe.

STATE OF ILLINOIS, *County of Cook,* } *ss:*

Burton Hanson, being duly sworn, deposes and says that he is one of the attorneys for the above-named petitioners, and has had the principal charge of the proceedings herein in behalf of said petitioners; that the amendment which said petitioners desire to make to each of their said petitions herein is not made for the purpose of vexation or delay, and that the matter of said proposed amendment is material and could not, with reasonable diligence have been sooner introduced into said petitions; that the subject-matter of said amendment was wholly unknown to the petitioners herein until such matters were testified to herein before the master in chancery, to whom these petitions were referred, by witnesses produced on said hearing in behalf of said receiver, and that said proposed amendment to said petitions is based wholly upon the testimony given by said witnesses before said master, and said amendment is made for the purpose of making the allegations of said petition conform with the proof as made by said receiver.

BURTON HANSON.

Subscribed and sworn to before me this 15th day of October, 1895.

[SEAL.] J. R. DICKENSON,
Notary Public.

57 *Amendment to Petitions.*

In the Circuit Court of the United States in and for the Southern District of Illinois.

THE MERCANTILE TRUST COMPANY OF NEW York, Complainant, *vs.* CHICAGO, PEORIA & ST. LOUIS RAILWAY Company *et al.*, Defendants.	Consolidated Cause.

And now comes the intervenors herein, The Chicago, Milwaukee & St. Paul Railway Company, The Carr, Ryder & Engler Company, The S. Y. Hyde Elevator Company, The W. W. Cargill Company, Jacob Rau, James N. Gilchrist and Colin F. Bell, partners under the firm name of Gilchrist & Company; The Huntting Elevator Company, Thomas McMichael and William McMichael, under the firm name of McMichael & Son, and Henry Rippe, by Burton Hanson and George P. Cary, their attorneys, and by leave of court first had and obtained, restate all the allegations contained in the petition of each one of the foregoing intervenors, as hereinbefore made and filed herein, and for a further, separate and distinct ground of recovery herein states as follows:

That upon the arrival of the cars mentioned and described in said petitions at said East St. Louis, and while the same were still in the possession of said receiver, said receiver negligently caused and permitted them, together with their contents, to be placed upon certain tracks in close proximity to a large wooden warehouse filled with bailed and loose hay, and through which said warehouse locomotive engines were frequently passing and repassing during all hours, night and day; that said wooden warehouse was open at the sides and ends, and had railroad tracks passing through it over which locomotive engines frequently passed, and said hay was generally exposed to fire escaping from said locomotives; that said warehouse and hay was easily ignitible, and on account of the inflammable condition of said hay, the large quantity thereof, and the dimensions of said wooden warehouse, the same, if set on fire, would burn with great rapidity and produce a great conflagration, all of which the receiver well knew, yet notwithstanding all this, he negligently and carelessly caused and permitted said cars and their contents to be placed upon said side track, near said warehouse, and to remain thereon for several days, when said hay and warehouse were in some manner set fire to, and the same burned so rapidly, and produced such a large conflagration, that said cars and their contents were damaged and destroyed, as stated in said

58 several petitions, and the petitioners damaged in the manner and to the extent and amount, as therein stated.

BURTON HANSON &
GEORGE P. CAREY,
Attorneys for Petitioners.

STATE OF ILLINOIS, } ss:
County of Cook, }

Burton Hanson, being duly sworn, deposes and says that he is one of the attorneys of the above-named petitioners; that he had read the foregoing proposed amendment to said petitions, and knows the contents thereof, and that the same is true, as he verily believes; that the grounds of his belief are information derived by him from the testimony given by witnesses produced in behalf of the receiver herein, before Mr. Stuart Brown, master in chancery, to whom these petitions have been referred for hearing.

BURTON HANSON.

Subscribed and sworn to before me this 15th day of October, A. D. 1895.

[SEAL.] J. R. DICKENSON,
Notary Public.

(Indorsed:) Filed April 8th, 1896. James T. Jones, clerk.

Afterwards, to wit, on the 10th day of April in the year of our Lord one thousand eight hundred and ninety-six, came Stuart Brown, Esq., one of the masters of this court, and filed in the clerk's office of said court his report, on said intervening petition, which report is as follows, to wit:

Report of Master in Chancery.

In the Circuit Court of the United States for the Southern District of Illinois.

MERCANTILE TRUST COMPANY *vs.* CHICAGO, PEORIA & ST. LOUIS. } Consolidated Cause.

Intervening petition of Jacob Rau.

Your subscriber, one of the masters in chancery of this honorable court, to whom the said intervention in the above-styled cause has been referred, would respectfully report that he has taken evidence, heard oral argument and had briefs presented upon the questions raised by the proof and herewith he offers his conclusions.

59 *The Pleadings*

Are the same in effect as were set out in the report of your subscriber on claim of T. McMichael & Son filed April 8th, 1896, and to which reference is hereby made.

The difference is shown in the amended stipulation as to proof which in this intervention was as follows:

"That the petitioner, Jacob Rau, of Wykoff, Minnesota, at the dates and times, and at the place in his petition mentioned, delivered to the Chicago, Milwaukee & St. Paul Railway Company, two (2)

car-loads of barley in cars as stated in his petition, consigned to the Orthweine Grain Company, St. Louis, Missouri, by way of East St. Louis, Illinois; that written receipts of which Exhibits B, C, D & E, attached to this stipulation are copies, were afterwards given by said railway company, as testified to by the witnesses, S. Y. Hyde and E. J. Tull; that said barley was destroyed by fire at said East St. Louis, during the night of October 28th, 1894; that said barley at the time it was so destroyed belonged to the petitioner, and was of the value of eleven hundred forty-four dollars and $\frac{7}{100}$ ($1,144.07); that the petitioner was damaged in that sum, and is entitled to recover that amount and interest, if it shall be adjudged that it is entitled to recover in this proceeding."

There is no dispute as to ownership of this barley, as it is admitted it was sent to Orthwein Grain Co. to be sold for owner on commission.

There is also no contention that the evidence shows any unreasonable detention of the barley in East St. Louis.

The question, then, alone remains: Were the two cars of barley claimed by petitioner delivered by the C., P. & St. L. R'y to the Terminal R. R.?

The evidence shows that the intervenor shipped by Chicago, Milwaukee & St. Paul R. R. Company on October 10, 1894, car No. 46064, and on the 16th day of October, 1894, car No. 43222, both loaded with barley and both consigned to Orthwein Commission Company, of St. Louis, Missouri, via East St. Louis, on commission. These cars, like those in T. McMichael & Son intervention, went to Rock Island, then by the R. I. & P. to Peoria, then by C., P. & St. L. to E. St. Louis, Illinois, and were placed on the Y tracks of Terminal Association on the 25th day of October, 1894, and were left upon the C., P. & St. L. deposit tracks, set apart for their use by the Terminal R. R., but not exclusively used by the C., P. & St. L. On the night of Sunday, October 28th, they were, with their contents, destroyed by fire. No notice of their arrival was given to owner.

60 No waybill was delivered to the Terminal R. R. giving direction as to further carriage. No junction report was issued by receiver to the C., M. & St. P., as was a general custom when cars were delivered by a connecting carrier to another railroad.

Conclusion.

For these reasons, and for others similar to those expressed in report on T. McMichael & Son claim (to which reference is hereby made), I find that the barley in question was held by the receiver, Bosworth, as a common carrier, and that the intervenor has a just claim against said receiver in the sum of eleven hundred and forty-four dollars and $\frac{7}{100}$ ($1,144.07), with interest thereon at the rate of 5% per annum from date of loss to this date, and that the same should be paid as the court may order.

All of which is respectfully reported this 7th day of April, 1896.

STUART BROWN, *M. C.*

(Indorsed:) Filed April 10, 1896. James T. Jones, clerk.

Exhibit to Report of Master.

T. McMichael & Son report.

In the Circuit Court of the United States for the Southern District of Illinois.

MERCANTILE TRUST COMPANY *vs.* CHICAGO, PEORIA AND ST. LOUIS. } Consolidated Cause.

Intervening petition of Thomas McMichael and William McMichael, doing business under the firm name of T. McMichael & Son.

Report of Master.

To the Hon. William J. Allen:

Your subscriber, one of the masters in chancery of this honorable court, to whom the said intervention in the above-styled cause has been referred, would respectfully report that he has taken evidence, heard oral argument and had briefs presented upon the questions presented by the proof, and herewith he offers his conclusions.

The Pleadings.

An intervention filed January 26, 1895, alleges among other things that on the 16th day of October, 1894, the petitioners delivered to the Chicago, Milwaukee & St. Paul Railway Company four
61 car-loads of barley in cars of said company, numbered 37506, 12336, 2598, 4126, and on the 19th day of the same month two other car-loads of barley in cars of said company, numbered 3728 and 18126; and on the 22d day of said month, two other car-loads of barley in cars of said company, numbered 10720 and 6842; also on the 6th of said month one car-load of barley in car of said company, numbered 36088, and on the 22d of said month, two other car-loads of barley in cars of said company, numbered 4268 and 7552; that all of said car-loads were consigned to Teichman Commission Company, St. Louis, Mo., via East St. Louis, Ills.; that all were transported by said C., M. & St. P. Company to Rock Island, Ill., and there delivered to the Rock Island & Peoria Railway Company, and by said last-named company transported to Peoria, Illinois, and delivered to the Chicago, Peoria & St. Louis Railway Company, and were by it transported as far as East St. Louis, and while still in transit and on their way to destination, and in the possession and under the control of said C., P. & St. L. R'y Co. the first-mentioned eight cars of barley and their contents were destroyed by fire on the evening of the 28th day of October, 1894, and damage resulted to petitioners of $2,942.56; that the last-named three cars and the barley contained therein *was* partially destroyed by said fire, and after its disposal damaged petitioners $226.68, making a total loss or damage to said petitioners of $3,169.24; petitioners

further allege that said barley belonged to them at the time it was so damaged, and that they were the sole owners thereof; petitioners ask for relief and that receiver pay said amount of $3,169.24 as a just claim prior to rights of mortgage bondholders.

On the 11th day of March, 1895, C. H. Bosworth, receiver, filed his answer, alleging that after delivery to the C., P. & St. L., and before the filing of the intervention, the said cars and their contents were delivered, in the due course of business, to the Terminal Railroad Association, of St. Louis, and while in their possession said cars were destroyed; and further that they were destroyed by a fire negligently caused by and originated in a spark coming from a certain engine belonging to and being operated by and in the service of the Terminal R. R. Association; and, further, while in the care and custody of said Terminal Association, under a contract whereby the Terminal railroad agreed to give the said receiver terminal facilities, handle trains, care for engines and freight, under a regular interchange of business and according to custom, exercising due care and caution, but said Terminal Association willfully and negligently stored said property in close proximity to a certain load of hay, which was fired by sparks from a certain passing switch-engine of said Terminal Association; and further said Terminal
62 Association caused said fire, by storing said inflammable hay in a veritable fire-trap; receiver denies responsibility, and asks to have Terminal R. R. made a party defendant.

On May 13, 1895, Bosworth, receiver, files a cross-petition, stating that all property mentioned in interventions was in care and custody of Terminal Association under a contract by which said Terminal R. R. was to give receiver terminal facilities, etc., and it was the duty of said association to exercise due care and caution in safe keeping and handling said cars, but it wilfully and negligently stored them in a dangerous place; that said cars were delivered to Terminal Association by receiver in due course of business, and while in the possession and under the care of said association were destroyed; and, although they allowed said cars mentioned in said interventions to be destroyed, they did save all of their said cars; asks for a rule to show cause why it should not be made a party defendant; June 1, 1895, rule entered, directed against Terminal R. R. Association, requiring it to show cause on or before June 15, 1895, why it should not be made a party defendant, etc.

June 15, 1895, Terminal R. R. Association by its solicitor, moves court to discharge rule of June 1st, for lack of jurisdiction and other reasons stated. No further action was taken on said rule and said Terminal R. R. Association was not made a party defendant.

August 27, 1895, a stipulation was entered into in this intervention (with others) by counsel for purposes of saving labor and expense of making proof, which said stipulation was afterwards, on January 23, 1896, amended by an order of court, and which stipulation was, in its amended form, as follows:

"That the petitioners, Thomas McMichael and William McMichael are partners engaged in business at McGregor, Iowa, under the firm name of T. McMichael & Son, as alleged, and that at the

dates and times and at the place in their petition mentioned, they delivered to them Chicago, Milwaukee & St. Paul Railway Company eight (8) car-loads of barley, in cars, as stated in their petition, consigned to the Teichman Commission Company, St. Louis, Missouri, by way of East St. Louis, Illinois. That written receipts, of which Exhibits B, C, D, and E. attached to this stipulation are copies, were afterwards given by said railway company, as testified to by witnesses S. Y. Hyde and E. J. Tull. That said barley was destroyed by fire at said East St. Louis during the night of October 28, 1894; that said barley, at the time it was destroyed, belonged to the petitioners, and was of the value of twenty-nine hundred and forty-two dollars and $\frac{56}{100}$ ($2,942.56); that the petitioners were damaged in that sum, and are entitled to recover that amount, with interest, if it shall be adjudged that they are entitled to recover in this proceeding."

63 (This omits three cars partially destroyed as above stated.)

September 4, 1895, replication, general, to answer of defendants, filed as of March 15, 1895.

October 24, 1895, amendment to petition filed. Alleges for further ground of recovery that upon the arrival of the cars mentioned and described in said petitions at said East St. Louis, and while the same were still in the possession of said receiver, said receiver negligently caused and permitted them, together with their contents to be placed near a wooden warehouse open at sides and ends and filled with combustibles, etc.

November 18, 1895, amended answer of receiver filed. Denies cars were placed by defendant, while some were still in possession of defendant, negligently near warehouse; further expressly denies knowledge of character of said wooden warehouse, affirms they were delivered to and in custody of Terminal Association under contract etc.; had no control over care, etc., affirms that intervening petitioners had knowledge, through their assignees, of condition of affairs; further that the cars and contents remained in close proximity to wooden warehouse with full knowledge, approval and consent of the said intervening petitioners, through their agents, the consignees, and thus remained for the convenience of said assignees, and at their risk.

The Evidence as to Ownership and Shipment.

From the evidence it appears that the firm of T. McMichael & Son sold to Teichman & Company by sample, 15,000 bushels of barley in October, 1894, at 58 cents net per bushel in St. Louis, Missouri. The eleven cars specified by number in the petition were shipped from McGregor, Iowa, at the time named, over the C., M. & St. P. railway, and freight to St. Louis was paid by shippers. The cars were delivered to Rock Island & Peoria R. R. and by these to C., P. & St. L. at Peoria, Illinois.

From the evidence it would appear that the custom was to send a sample of barley by express to commission-house at St. Louis, which made a bid upon it. If the bid was accepted the grain was deliv-

ered to the C., M. & St. P. for delivery at St. Louis, via East St. Louis, subject to inspection and weighing.

These cars were transported to East St. Louis by the last-named railroad on November 2, 1894; W. R. Bradley, car accountant of the C., P. & St. L., reported the first eight car numbers burned by fire at East St. Louis, October 28, and last three car numbers as damaged by fire at East St. Louis, October 28th.

On October 30th the consignee Teichman Commission Company wrote to shipper "We are convinced that several of *your cars* were in the lot of burned and damaged barley. We would now
64 suggest that you give notice to your railroad at your end, to push the Jacksonville Southeastern line here, to adjust loss sustained, as speedily as possible."

On November 2d, the consignee telegraphs "Will you replace the burnt barley at once to fill sale."

To which shipper answered:

"Yes, will load tomorrow."

On November 2d, consignee writes as follows:

"We are in receipt of your telegram saying you will replace your barley lost by the late fire; we now have the assurance of the receiver of the J. & S. E. R. R. that they are amply able and anxious to settle the loss of barley by fire, as speedily as possible, which, however, may be delayed by the question arising if the barley is covered by their insurance policy or by the one held by the Terminal Railway Company, which will soon be determined, as that company is co-operating with the J. & S. E. R. R. to effect an adjustment."

On November 3rd, the shipper writes consignee:

"We have made bill for cars X X X and sent same to C., M. & St. P. R. R. and presume they will pay us as soon as they look it up."

Conclusions as to Ownership.

Notwithstanding the stipulation of August 27, 1895, quoted above, the claim is now made that petitioners are not the owners of this barley, but have parted with their title to consignee. Taken in its barest legal sense, delivery is made by a vendor when he gives up his goods to a common carrier for transportation. Even law courts, however, do not hold this rule without exception, but where there is anything to be done as of weighing or measuring, they hold the performance of these things a condition precedent. There were goods sold by sample and the vendee had the right to refuse to accept them if not up to grade. But further, it is very apparent from the acts of the parties that they intended the barley to be delivered at St. Louis. The shipper's willingness to assume responsibility of an action against the carriers is not, of course, conclusive, but the intention of the parties is clearly displayed by the correspondence after the loss of the consignment where both shipper and consignee immediately act upon the understanding that it was the shipper's loss and that the carrier was the shipper's agent. The object in a court of equity is moreover to discover the true owner of

these goods and not the technical owner, and where the parties in interest agree as to ownership of goods, the carrier is amply protected in any payment he may make.

My conclusion is that intervenors have properly brought suit.

65 *Custom as to Barley.*

It is contended by counsel for defendant that the liability of the receiver cannot be greater than that of warehouseman. This contention is not raised in the answer to the original petition, but may be considered as raised by the answer to the amended petitions. It is, of course, entirely inconsistent with the defense that the car had been delivered to the Terminal Railroad Association, for if they held them as warehousemen, then they had not delivered them. Still, however, admitting the question is subject to discussion, the burden of proof, is in such case most certainly cast upon the carrier; its liability as an insurer continued until the cars had reached their destination and been unloaded or placed in a safe warehouse, or place for unloading.

Porter v. Chicago & R. I. R. R., 20 Ill., 407.
C. & N. W. R. R. Co. v. Bensley, 69 Ill., 630.

The destination of the cars was St. Louis, Missouri (see stipulation),

Wabash R. R. v. Jaggerman, 115 Ill., 407,

and it is very uncertain whether consignee, under the circumstances, even if notice to him had been given, could prejudice the rights of the owner by any change of destination. I am of the opinion that either the receiver or the Terminal railroad held the barley as a common carrier. Having reached that conclusion, it is unnecessary to discuss the degree of care exercised.

Do the limitations in the bills of lading or shipping receipts enaure to the benefit of connecting carrier?

Certainly not in this case. In the case cited by counsel for defendant, *R. R. Co. v. Mfg. Co.*, 16 Wallace, 318, and which was delivered in a State where no laws had been passed as to limitations of liability the court says: "It is not only against the policy of the law, but a serious injury to commerce to allow the carrier to say that the shipper of merchandise assents to the term proposed in a notice, whether it be general to the public or special to a particular person, merely because he does not expressly dissent from them." But by the laws of Iowa, the shipping point, and by the laws of Illinois, the place of loss, common carriers are prohibited from limiting their common-law liability in any receipt.

Further, it developed from the evidence that the bills of lading as shown, were given subsequent to the destruction of property and simply as evidence of shipment.

"After the goods are shipped, it is too late to impose upon the shipper a cause exempting the carrier from liability from loss by fire, after such fire has occurred."

Lamb v. Camden & A. R. Co., 4 Daly, 483.

66 I am therefore forced to the conclusion that the owners of this barley have a just claim for its value from one of the common carriers who have transported it, or agreed to transport it.

The evidence is conclusive that the barley was safely carried by C., M. & St. P. to Rock Island and from there carried by the Rock Island & Peoria, to Peoria, Illinois; where it was delivered to the C., P. & St. L. and by it transported to East St. Louis.

The sole question then remains was it delivered by the C., P. & St. L. to the Terminal Railroad Association, for further carriage.

What is the evidence as to

Delivery.

The barley in question was carried by the C., P. & St. L. to the end of its track proper. There is no connection between that point and the Eads bridge or Wiggins ferry leading to St. Louis, Missouri. The old C., P. & St. L. R. R. having no terminal facilities in East St. Louis for the forwarding of freight prior to the receivership, made an agreement with the Terminal Railroad Association of St. Louis, to furnish the needed facilities. This agreement was made June 1, 1891, and as never formally re-enacted by the receiver, but his testimony shows that he ratified its and was and is now doing business under it. It provided for the handling of C., P. & St. L. trains, cars of its engines and cars, and the handling and care of freight at the rate of fifty cents for each loaded car and regular freight charges. By it, the Terminal railroad agreed to furnish the necessary yard room, or track facilities, switch-engines, and yardmen in making up and breaking up all freight trains, &c. The course of business under this agreement was for the C., P. & St. L. to carry its freight to the end of its own tracks proper, and then upon certain Y tracks which belonged to the Terminal railroad; here the engine of the C., P. & St. L. to carry its was cut off, and the Terminal engines broke up and the train deposited its cars upon certain tracks in the Terminal yards. These tracks of deposit were not exclusively used by the C., P. & St. L., but the cars seem to have been always placed upon them. A wooden warehouse through which these tracks ran or was near to was not used at the time of the fire by the C., P. & St. L. railway, but was used by a commission company for the storage of bailed hay. This warehouse was, as the evidence shows, a dangerous fire-trap.

From the statement of Calvert, the agent of the C., P. & St. L. at East St. Louis, it appears that the cars containing this barley came to the Y tracks on the following dates:

4126 on October 25, 1894.
2598 on October 25, 1894.
12336 on October 26, 1894.
3728 on October 26, 1894.
18126 on October 26, 1894.
10720 on October 26, 1894.
6842 on October 26, 1894.
4268 on October 26, 1894.
7552 on October 26, 1894.
37506 on October 26, 1894.

67 Two arrived there on the third day before the fire, nine on the second day, and one on the night before.

On the night of Sunday, October 28th, the fire broke out in the wooden warehouse about 11 p. m., and consumed it, together with the cars in controversy, and many others. The origin of the fire does not appear from the evidence, but it is supposed to have resulted from sparks of a passing engine communicated to the hay in the warehouse and fanned by a high wind. Evidence admitted under objection showed that the Terminal railroad attempted to save its own cars first, and would not allow agents of the C., P. & St. L. to direct the movement of engines. The evidence as to course of business further showed that when cars were set on these deposit tracks, they remained there until a waybill was prepared by the agents of the C., P. & St. L., directing their transfer or forwarding to some other point. When this waybill was presented to the Terminal railroad, its engines again took hold of the cars designated, and placed them wherever the waybill ordered. When this waybill was presented to the Terminal railroad, then, and not until then, the car accountant of the C., P. & St. L. made out a junction report. Junction reports in was shown were a general custom of railroads, and were simply a postal card sent to and informing the railroad, which had originated a car of freight, that a car, designated by a certain number, had been delivered to a connecting carrier by the railroad sending the card. Their purpose, of course, being to keep track of cars.

The evidence in this case shows that no waybill for these cars was given to the Terminal R. R., nor was any junction report sent to the C., M. & St. P.

The evidence further shows that no notice was sent to the owner, shipper or consignee of the arrival of said cars at St. Louis, or of the delivery of them to the Terminal railroad.

The evidence also shows that Calvert, the local agent of the C., P. & St. L. made a claim against the insurance company for the value of these cars and contents, stating that the fire occurred on October 28, 1894, and consumed this freight in transit. Also, that salvage operations were carried on by the C., P. & St. L., and the result paid to the shipper. Also, that the cars damaged and not entirely destroyed by said fire, were repaired at the cost of the C., P. & St. L. railroad and returned to their owners. The evidence, however, also shows that the receiver ordered insurance claims to be filed because of the time limit imposed by the insurance policies, and that he made salvage and repaired cars after demand upon the Terminal R. R. to the same, and with the understanding that his action should not prejudice any claim he might have against the Terminal Association.

Whatever bearing these admissions may have with relation to the shippers I have not considered.

68 *Conclusions.*

It may be assumed that the rule in America is that the obligation of a common carrier of goods is to carry them over its own line and safely deliver to the connecting carrier, and, if there is a necessity for storage, it is considered a mere accessory to transportation.

R. R. v. Mfg. Co., 16 Wallace, 318.

The burden of proof is upon the carrier to show that at the time of loss, without negligence on his part, his liability as insurer had terminated.

P. & P. N. v. C., R. I. & P., 109 Ill., 135.
R. R. v. Mfg. Co., 16 Wall., 318.
Schulter v. Adams Exp. Co., 5 Mo., 316.

The question to be determined is whether anything remains to be done by the carrier in completion of its contract to safely carry and deliver.

Gregg v. Ill. Cent., 147, 556.

"It is very clear that the simple deposit of the goods by the carrier in his depot, unaccompanied by any act indicating the intention to renounce the obligation of a carrier will not change or modify even his liability."

R. R. v. Mfg. Co., 16 Wall., 318.

Notice must be given consignee.

Carrier who receives goods for further transportation continues liable as carrier until they are received by another carrier, or until he in some way distinctly renounces responsibility.

Conkey v. M. & St. P. R. R. Co., 31 Wis., 619.

Judging this case by the above rules, did anything remain to be done by the C., P. & St. L.?

Was the intention to renounce its obligations indicated by any act?

Was notice given to consignee?

Did C., P. & St. L. distinctly renounce its responsibility?

Were the goods left in the sole control of the Terminal railroad?

Under the evidence these questions must be answered adversely to the receiver.

The tracks set apart for the use of the receiver were, as far as this controversy goes, his own. They were his by the agreement of leasing. They were not a destination point. It was not intended nor was it feasible to unload there. After the cars reached that point, they could not be controlled nor taken away by the Terminal railroad, which was simply one of the instruments used by receiver in his carriage of freight. It was only by the further act of the receiver or his agents that the cars could be moved at all. It
69 was not in the power of the Terminal railroad under the lease to change his order of things, whereas the receiver

might at any moment have terminated his responsibility by issuing a waybill, directing the further carriage of the cars to their proper destination.

The supreme court of Illinois have, it is true, in Smyser case, 38th Illinois, said that the mere signing of a bill of lading alone does not transfer freight, but that is evidence of transfer; they were speaking of the original shipment, and of the initial carrier. In such a case, the acceptance of freight of course controls. So in the case at bar—no bill of lading was issued by the C., M. & St. P., but they accepted the freight and became a carrier by their own act. The Terminal railroad did not however accept this freight at East St. Louis. They had no opportunity to do so.

So in *Pratt v. Grand Trunk*, 5 Otto, 43.

Where there was a joint possession and a definite place for deposit of goods destined for transportation, the court properly says, that the goods were under the control of the agents of the R. R. Co.; that they were deposited and received for transportation; that no further orders were expected.

So also in *Merriman v. Hartford R'y Co.*, 24 Conn., 354, it was held that if a common carrier agree that property may be deposited in a certain place without notice to him, such deposit alone is sufficient delivery, and such agreement may be shown by a constant practice and usage.

But in the case at bar, the facts were the direct converse of these above-recited cases. The usage and custom was shown to require a waybill or special notice.

This case likens itself to the case of *Mt. Vernon Car Co. v. Alabama G. S. R. Co.*, 92 Ala., 296.

I quote from Ray on Freight Carriers:

"The placing of a car by an initial carrier on the side track of the connecting carrier, without giving the latter any notice, and without marking it with the name and address of the consignee, or sending any waybill or shipping directions does not establish the relation of contractors between the initial and the connecting carrier."

The reason of such a rule is apparent on a moment's reflection. What order or system could be maintained if the hundreds of cars that pour into such a terminal point were without direction? It is also significant in this connection that the junction reports, that the evidence shows were made when a transfer took place, were not made for these cars.

I reach the opinion that the intervenors have a just claim against the receivers in the sum of $3,169.24, and interest at 5 % from loss, and that it should be paid as the court may order.

All of which is respectfully reported this 7th day of April, 1896.

STUART BROWN, *M. C.*

70 Afterwards, to wit, on the 27th day of April, in the term and year last aforesaid, came again the receiver and filed in the clerk's office of said court his exceptions to the report of the master, which exceptions are as follows, to wit:

Exceptions of Receiver.

In the Circuit Court of the United States for Southern District of Illinois.

MERCANTILE TRUST COMPANY
vs.
CHICAGO, PEORIA & ST. LOUIS RAILWAY Company. } Consolidated Cause.

In the matter of the intervening petition of Jacob Rau.

Exceptions of the Receiver to the Master's Report.

Now comes C. H. Bosworth, receiver herein, and excepts to the report of Stuart Brown, master in chancery, filed in the above-entitled matter on the 10th day of April, 1896, and for cause of exceptions shows:

First. For that the said master has, by reference to his report made on the intervening petition of T. McMichael & Son, filed in the above-entitled consolidated cause on the 8th day of April, 1896, reported that the destination of the cars containing said barley was St. Louis, Missouri; whereas, the said master should have reported that the destination of said cars and their contents was East St. Louis, Illinois.

Second. For that the said master as, by reference to his report, on the intervening petition of T. McMichael & Son above referred to, reported that either the receiver or the Terminal railroad held the barley in question as a common carrier; whereas said master should have reported that the barley in question, at the time of its damage and destruction, was in the custody and under the complete control and management of the Terminal Railroad Association of St. Louis as a warehouseman.

Third. For that the said master has, by reference to his report, on the intervening petition of T. McMichael & Son above referred to, reported that the limitations in the bills of lading or shipping receipts do not enure to the benefit of connecting carriers; whereas said master should have reported that the bills of lading or shipping receipts, under and by virtue of which said barley was transported, constitute specific contracts, containing a clause exempting the carriers from liability from loss by fire, and that the benefit
71 of said contract enured to each of the connecting carriers, including the receiver.

Fourth. For that the said master has failed and refused to report that the barley in question, at the time of its damage and destruction, had been delivered by the receiver to the Terminal Railroad Association of St. Louis, in the due course of business, and was then in the custody and under the complete control and management of said Terminal Railroad Association of St. Louis.

Fifth. For that the said master has reported that the intervenor has a just claim against the receiver in the sum of $1,144.07, with

interest thereon at the rate of five per cent. per annum, from date of loss to the 7th day of April, 1896, and that the same should be paid as the court may order; whereas said master should have reported that said intervenor was not entitled to recover from the receiver for the loss and damage occurring to said barley, by reason of said fire, and that said intervening petition should be dismissed at intervenor's cost.

Sixth. For that the said master has failed and refused to report that it appears from the evidence, that the consignee of said intervenor had entered into a contract with the Terminal Railroad Association of St. Louis, by virtue of which the latter was holding said barley, at the time of its loss and damage as a warehouseman, awaiting further orders as to reshipment from said consignee, and for the convenience of said consignee, as the agent of said intervenor.

Seventh. For that the said master has failed and refused to report that it appears from the evidence that the consignee of said intervenor was acting as his agent; and that said intervenor had full knowledge of the manner in which said barley was being handled at East St. Louis, through his agent, said consignee, and acquiesced therein.

Eighth. For that the said master has failed and refused to report that it appears from the evidence that it was the custom of the consignee of said intervenor to have the grain, which intervenor shipped to them, held in the yards of the Terminal Railroad Association at East St. Louis, to await further orders as to reshipment, and that said further orders of reshipment were dependent upon the state of the market, and the sales made by said consignees; and that said barley, at the time of its loss and damage, was being held in the yards of the Terminal Railroad Association at East St. Louis, awaiting further orders of reshipment, and at the convenience of said intervenor, through his agent, the said consignee.

Ninth. For that the said master has failed and refused to report that the obligation of the receiver, as a common carrier, was to transport said barley to East St. Louis only, and there put it
72 on the tracks of the Terminal Railroad Association of St. Louis in the usual place of deposit, where, the evidence shows, it was the custom acquiesced in by the intervenors, through their agents, the consignees, to allow the same to remain until said consignees should desire to reship it, whereupon, according to the said custom, a separate contract of carriage would be entered into with, and a new bill of lading issued to said consignee.

Tenth. For that the said master has found and reported that the said receiver was liable to the intervenor, as a common carrier; whereas, the said master should have found and reported that the said receiver, as a common carrier, had in all respects complied with his contract of carriage by safely transporting and delivering the grain to East St. Louis, and there depositing it in the customary and usual place for delivery, on tracks designated for that purpose, in the yards of the Terminal Railroad Association of St. Louis, and for that reason was fully discharged from all liability in respect to the loss of said grain by fire.

Eleventh. For that the said master has found and reported that said receiver, as a common carrier, was liable to intervenor for the loss of said grain; whereas, he should have found and reported that the said fire occurred after the said receiver had faithfully delivered the said goods at their point of destination, under the contract with said receiver; and that the said goods were thereafter lost by fire through the negligence of the Terminal Railroad Association of St. Louis, and not through any default or negligence of said receiver.

And thereupon this receiver prays that the said master's report be annulled and set aside, and that a decree may be entered on said intervening petition, dismissing the same at petitioner's cost.

C. H. BOSWORTH, *Receiver*,
By BLUFORD WILSON AND
P. B. WARREN,
His Solicitors.

(Indorsed:) Filed April 27, 1896. James T. Jones, clerk.

Afterwards, to wit: on the 3d day of March, in the January term of said court, in the year of our Lord one thousand eight hundred and ninety-seven, the following further proceedings were had in said cause and entered of record, to wit:

73 *Order, March* 3, 1897.

United States Circuit Court, Southern District of Illinois, January Term, 1897.

MERCANTILE TRUST COMPANY
vs.
CHICAGO, PEORIA & ST. LOUIS R. R. Co.

Interventions of—
Chicago, Milwaukee & St. Paul Railway Company;
W. W. Cargill Company;
T. McMichael & Son;
S. Y. Hyde Elevator Company;
Huntting Elevator Company;
Jacob Rau;
Gilchrist & Company;
Henry Rippe;
Carr, Ryder & Engler Company.

It is ordered by the court that the exceptions filed in the foregoing interventions, respectively, by the defendant, receiver of the Chicago, Peoria & St. Louis Railroad Company, to the reports of the master, be and the same are severally overruled and the reports respectively approved.

Afterwards, to wit: on the 5th day of April, in the term and year last aforesaid, the following further proceedings were had in said court in said cause, and entered of record, to wit:

Decree, April 5, 1897.

In the Circuit Court of the United States for the Southern District of Illinois.

THE MERCANTILE TRUST COMPANY OF NEW York, Complainant,
vs.
CHICAGO, PEORIA & ST. LOUIS RAILWAY Company *et al.*, Defendants.
} In Equity. Consolidated Cause.

In the matter of the intervening petition of Jacob Rau.

And now on the 5th day of April, A. D. 1897, came again the said intervenor, Jacob Rau, by Burton Hanson and George P. Cary, its counsel, and the said Mercantile Trust Company of New York by Bluford Wilson, its counsel, and also C. H. Bosworth, receiver herein, by Bluford Wilson and P. B. Warren, his counsel, and this cause coming on to be further heard upon the exceptions of the said C. H. Bosworth, receiver, to the report of the master in chancery herein, and the court having heard argument of counsel, and being sufficiently advised, doth order and adjudge and decree that said exceptions be, and they are hereby overruled, and the report of said master is in all things confirmed.

74 It is further ordered, adjudged and decreed by the court that said C. H. Bosworth, receiver, pay as a part of the expenses of his receivership, within ninety days from the entry of this decree, the said sum found to be due to said intervenor, Jacob Rau, to wit, the sum of one thousand four hundred and forty-four dollars and seven cents ($1,444.07), with interest thereon at the rate of five per cent. (5%) per annum from the 10th day of April, 1896, the date of the filing of the master's report, to the entry of this decree, making a total of principal and interest the sum of fifteen hundred and sixteen dollars and seven cents, and costs, exclusive of clerk's fee, amounting to sixteen dollars and — cents, making a total of principal, interest and costs of fifteen hundred and thirty-two dollars and seven cents ($1,532.07).

It is further ordered, adjudged and decreed that inasmuch as the aforesaid amount is properly chargeable to the expenses of the receivership of C. H. Bosworth herein, this decree for the payment of said amount to said intervenor, Jacob Rau, be and the same is hereby adjudged to be a lien upon all the property and income of said defendant, Chicago, Peoria & St. Louis Company, as it existed and was known during said receivership, in favor of the intervenor, Jacob Rau, and upon all of the property and income of the purchaser or purchasers, purchased at the foreclosure sale heretofore had, their successors or assigns.

It is further ordered, adjudged and decreed that said lien be and the same is hereby adjudged to be a lien upon all the property and income of said defendant, Chicago, Peoria & St. Louis Railway Company, its said purchaser or purchasers, their successors or assigns,

prior and superior to the lien of the mortgage given by said defendant railway company to the Mercantile Trust Company of New York, and to any and all mortgages that may have been placed upon said property by said defendant, or said purchaser or purchasers, their successors or assigns, or which may hereafter be placed upon said property.

And the court having in the original decree and confirmation of sale thereunder specially reserved the right of caption of the property of said Chicago, Peoria & St. Louis Railway Company to enforce the payment of the sum or sums that might be decreed to be liens on said property, it is further ordered, adjudged and decreed that if said amount herein adjudged and decreed to be paid to said intervenor, Jacob Rau, is not paid within the time herein limited, the said C. H. Bosworth, as receiver, is hereby directed to take possession of all of said railroad property, together with its income, rolling stock and real estate, and operate the same, and out of the net earnings pay the amount due on this decree to Jacob Rau.

75 And afterwards, to wit: on the first day of June, in the year last aforesaid, a certificate of evidence in the matter of said intervening petition of Jacob Rau was filed in the office of the clerk of said court, as follows:

Certificate of Evidence, Aug. 27, 1895.

In the Circuit Court of the United States for the Southern District of Illinois.

THE MERCANTILE TRUST COMPANY OF NEW YORK *vs.* CHICAGO, PEORIA & ST. LOUIS RAILWAY COMPANY *et al.*	In Chancery. Consolidated Cause.

In the matter of the intervening petition of Jacob Rau.

I, William J. Allen, judge of the said court, by and before whom the said cause was heard, do hereby certify that the following depositions, exhibits, statements and agreements were read in evidence therein, by the several parties thereto upon the hearing thereof, that is to say: On behalf of the intervenors, the following:

On Tuesday, August 27th, 1895, before Stuart Brown, master in chancery of the United States court for the southern district of Illinois, in the case of The Mercantile Trust Company and others against The Chicago, Peoria and St. Louis Railway and others, a consolidated cause pending in said court, and in the matter of the interventions in said cause by the Chicago, Milwaukee and St. Paul Railway Company, W. W. Cargill and Company, T. McMichael and Son, S. Y. Hyde Elevator Company, Huntting Elevator Company, Jacob Rau, Gilchrist and Company, Henry Rippe, Carr, Rider and

Engler Company, the following testimony was taken on behalf of said petitioner, by consent signatures of witnesses being waived; the petitioners being represented by George P. Cary and Burton Hanson and defendants by Bluford Wilson and P. B. Warren; V. Hickox acting as stenographer.

Testimony of F. X. Roederer.

F. X. ROEDERER sworn:

Direct by Mr. BURTON HANSON:

Q. Where do you reside?
A. St. Louis.
Q. What is your business?
A. Freight agent for the Terminal Railroad Association of St. Louis.
Q. How long have you been in that position?
A. Something over three years.
Q. The Terminal Railroad Association of St. Louis and
76 the Chicago, Peoria and St. Louis Railway Company have an agreement in reference to the use of certain tracks of the Terminal Association at East St. Louis, have they not?
A. Yes, sir.

It is stipulated that a copy of this paper may be used instead of the original.

Mr. WARREN: If it is a copy. The master can compare it.
Q. I have compared it.
Mr. WARREN: All right.
(Paper offered and marked Exhibit "A.")

Q. Has the Chicago, Peoria and St. Louis railway any terminal facilities at East St. Louis?
A. I am not familiar, but they have a freight-house there on what is known as the island.
Q. For cars that the Chicago, Peoria and St. Louis bring into East St. Louis, consigned to St. Louis, has it any terminal facilities of its own for the handling of the cars?
A. Well, they have no terminals in St. Louis that I am aware of.
Q. East St. Louis?
A. Would be sent to East St. Louis and then be sent over.
Q. My question is whether they have any terminals in East St. Louis for those cars consigned to St. Louis.
A. Not I am aware of, of their own.
Q. Was it not for that reason this arrangement was made provided for in this contract?
A. Yes, sir.
Q. Have you a map of the tracks of the Terminal Railroad Association at East St. Louis?
A. East St. Louis yard; yes, sir.
Q. I will show you this blue print which is designated as a map of a part of East St. Louis between the Relay depot and the stock

yards, dated November 3, 1890, and ask you if that correctly represents that part of the Terminal at East St. Louis.

A. Yes, sir; that represents the yard of the Terminal Railroad Association at East St. Louis, and also shows the portion operated by the C., P. & St. L.

Q. On this map are certain red lines; what are those red lines?

A. Tracks in the yard set apart for the C., P. & St. L. railway, two of them going through the building.

Q. These that are marked red, are those the tracks set apart and commonly used by the receiver of the C., P. & St. L., under this agreement introduced in evidence, and dated August 1, '92?

(Objection.—Let the contract show for itself.)

77 A. Yes, sir; provides certain facilities, and those tracks in red were used for that purpose.

Q. Used by the receiver in this proceeding?

A. Yes, sir.

Q. I will ask you if these tracks marked on this map, or blue print, in red are the tracks set apart and commonly used by the receiver in handling trains under this agreement?

(Objection, for the reason stated.)

A. Yes, sir.

Q. There was a fire in this yard on the evening of the 28th of October, 1894; where was that fire with reference to these tracks marked red?

A. It was a building about the center of those tracks, commonly called the jack yard—building known as transfer station.

Q. Marked on the blue print, Terminal Association freight transfer; platform and platform; those the buildings?

A. Yes, sir.

Q. Are you familiar with the custom which prevailed during the business of the receiver under this contract?

A. I am not stationed there, and I could not say that I have actually seen it done, yet, under my instructions, which I assume are carried out, I may speak of it; and I know from personal knowledge of there having been frequently cars on those tracks in what we called the jack yard.

Cross-examination by Mr. BLUFORD WILSON:

Q. Do you mean to say that the tracks referred to in your testimony, as set apart and designated for the use of the receiver of the Chicago, Peoria and St. Louis railway were exclusively used by him?

A. Yes, sir; they were set apart for their use, and so far as I know were exclusively used by that road.

Q. Do you know?

A. I couldn't say that from personal knowledge.

Q. For all you know, these tracks referred to were used in common both by the Terminal Association and the receiver?

A. Well, so far as I know, such might be the case; I couldn't say directly no or yes.

Q. Do you know that the cars referred to in your examination-in-chief were the cars of the receiver of the C., P. & St. L.?

A. I said I had seen cars on the tracks. Going through I have seen the tracks used—seen C., P. & St. L. cars. That is, cars belonging to the C., P. & St. L. road, and foreign cars that came in on their line.

78 Q. I will ask you if a few of the tracks designated went through the freight building?

A. Yes, sir; I so stated.

Q. By what company and by whose cars were those tracks occupied?

A. Well, those tracks were used by the receiver, and also at that time by a party transferring hay.

Q. Who was the party?

A. The Gratiot Freight Warehouse Company, I think.

Q. I will ask you if it is not a fact that at the time referred to, the freight-house itself and store was leased to the Gratiot Company, and used by them in fact, and stored with a large quantity of hay?

A. I could not say it was leased; don't think it was; but at the time of the fire they were transferring hay.

Q. Do you know who the hay belonged to?

A. I assume it was on account of the parties doing the transfer.

Q. The Gratiot Company?

A. Yes, sir.

Q. I will ask you if it is not a fact that these tracks—there were two of them, I believe—the two tracks that ran into this house were in common and daily use by the Terminal Association or their lessees?

A. What do you mean by lessees?

Q. Not the C., P. & St. L.

A. I couldn't say that there was any other lessee, or that it was used by any other.

Q. Haven't you said the Gratiot Company used those tracks?

A. Yes, sir.

Q. Who did they get authority from?

A. The Terminal Railroad Association.

Q. Your attention has been called to the map offered in evidence by opposing counsel?

A. Yes, sir.

Q. I will ask you if these two tracks running into this house are not two of the tracks indicated on the map as being exclusively used by the receiver of the C., P. & St. L.?

A. Yes, sir.

Redirect by Mr. HANSON:

Q. While these tracks marked red, and as you say set apart for the receiver, may have been used by others, isn't it true the receiver has all the use he may have need of of those tracks?

A. So far as I know; not being stationed there, I could not answer positively.

79 Q. But isn't it understood between the two companies in the actual daily practice, that these are the tracks the receiver is to occupy with his cars?

A. That is my understanding.

Q. I now offer this blue print in evidence, marked Exhibit "B."

Cross-examination by Mr. WILSON:

Q. Do you mean to be understood as swearing that the tracks indicated on your map or on the blue print were the only tracks that were used by the receivers of the C., P. & St. L. in your yard at East St. Louis?

A. So far as his business is concerned, yes, sir; so far as my knowledge goes.

Q. Under whose direction were the cars placed on the tracks at East St. Louis?

A. On those tracks designated?

Q. Any tracks in your yards?

A. That would depend on the business. Take the receiver's business; train would be placed under his direction there, but after they were turned over to the Terminal Association they might be placed on any of those tracks.

Q. Do you mean to say that the receiver had any control whatever of these tracks for the purpose of designating particularly on which any particular car should be shoved?

A. I couldn't say, but when any of his trains came in they were placed on his track.

Q. Suppose those tracks, as you have stated, had been filled with the hay cars of the Gratiot Company, what would you have done with the cars of the receiver?

A. Don't think that is a possible case; that could not be.

Q. Haven't you just testified that those two tracks running through the freight building were occupied by the Gratiot Company?

Mr. HANSON: He stated the depot was.

Q. Tracks, too?

A. I stated that two of the tracks set apart to the receiver ran through the building, and so far as they ran through the building there was hay loaded and unloaded on those tracks.

Q. Know of any other companies besides the Gratiot Company using those tracks?

A. No, sir.

Q. State definitely whether it is or not a fact that the tracks indicated on the blue print were in common use by the C., P. & St. L. and other patrons of the Terminal Association, and that such

80 use was under the immediate direction of the yardmaster of the Terminal Association.

A. So far as I know they were not.

Redirect by Mr. HANSON:

Q. If they were under the direction of the yardmaster, had the yardmaster set apart these tracks to be used by the receiver?

(Objection.—Says he doesn't know.)

A. I don't know so far as the yardmaster is concerned, not being stationed there myself, how he did his work. I merely directed how the work should be done.

Q. What were the directions to the yardmaster with respect to the tracks the receiver should have the use of under this agreement?

A. General instructions under the contract; certain facilities furnished the C., P. & St. L.

Q. What were they?

A. Certain tracks designated in red; from forty to fifty, I think.

Cross-examination by Mr. WILSON:

Q. Are you able to state who designated the *facts* (tracks)?

A. No, sir; I couldn't state that.

Q. Do you mean to say by any of your testimony that the receiver of the C., P. & St. L., or the railway company itself was even consulted, or had any voice in the selection of the tracks in question?

A. Well, I couldn't state from knowledge; that portion of the yard was set apart before I went to the company, so far as I know.

Q. Then you don't know?

A. No, I couldn't answer.

Redirect by Mr. HANSON:

Q. Do you know what the receiver has done with reference to those directions since you have been there?

A. My conclusion is——

(Objection.—His conclusion is not evidence.)

81 *Testimony of George H. Phelps.*

GEORGE H. PHELPS, sworn.

Direct by Mr. HANSON:

Q. Where do you reside?

A. St. Louis.

Q. What is your business?

A. Local agent of the East St. Louis Terminal Association.

Q. How long have you been so?

A. Two and a half years.

Q. Are you familiar with the method in which the receiver of the C., P., S. P. & St. L. transacts the business of the road at St. Louis?

A. As far as we are concerned, yes, sir.

Q. Has the C., P. & St. L. *L.* or the receiver any terminal facilities at St. Louis?

A. No, sir; not outside of two or three tracks at their freight station on the river front.

Q. What tracks are used by the receiver of the C., P. & St. L. and have been used for the last year, of the tracks belonging to the Railroad Terminal Association?

A. Tracks shown in red on the blue print.

Q. Those are the tracks the receiver has used?

A. Yes, sir.

Q. And those tracks belong to the Railroad Terminal Association?

A. Yes, sir.

Q. Know whether those tracks have been used under any agreement?

A. Yes, sir; under an agreement to do the terminal work of the C., P. & St. L.

Q. Now when a train of the receiver comes into this yard from the north, where will it come to a stop, with reference to any track on this map?

(Objection.—Unless he testifies with some degree of care, with reference to the map it will not be understood by the master of the court.)

Q. I will designate the track.

A. Tracks known as "Y's;" three "Y" tracks; their freight trains come in there and stop.

Q. Those "Y" tracks are the tracks which appear on this map as connecting and are marked as Terminal Association range yard—to the Wabash junction—they are just north——

A. North and west of the portion of the yard assigned to the C., P. & St. L.

82 Q. North and west of the tracks marked in red?

A. Yes, sir.

Q. The train comes in on this "Y;" what is then done with it by the receiver, if anything?

A. The train stops on the "Y," and the receiver is done with them.

Q. These "Y" tracks belong to the Terminal Railroad Association?

A. Yes, sir.

Q. What is then done with this train?

A. The train is broken up and put on the tracks assigned to the C., P. & St. L.

Q. What are those tracks in reference to any outline on the map?

A. Outlined in red.

Q. What company breaks up this train and places the cars on the tracks marked red?

A. The Terminal Railroad Association.

Q. That done under the agreement introduced here?

A. Yes, sir; at a certain sum per car.

Q. What sum?

A. Fifty cents a car.

Q. When that train is broken up, as you have stated, and the cars set on the tracks marked red, what is then done with these cars?

A. We are done with the cars then, until we get waybills from the agent of the C., P. & St. L.

Q. From the receiver?

A. Yes, sir; from the agent of the receiver.

Q. When you get a waybill—what is a waybill?

A. A manifest showing what disposition is to be made of the freight.

Q. When you receive the waybill of a car what do you do then?

A. Card that car out, and our yardmen are instructed to switch it out and deliver it according to the instructions.

Q. Does this waybill contain the number of the car and destination?

A. Yes, sir; consignee, destination and route?

Q. When you receive this waybill and switch the car out, where do you take it?

A. Take the car out of their yard, their portion of the yard, and place it in the train in our portion of the yard, and take it to the connection or destination indicated.

Q. Is this the practice which has prevailed ever since the receiver has been operating there?

83 A. Ever since I have been there.

Q. And you have been there how long?

A. Two and a half years.

Q. There now?

A. Yes, sir.

Q. For the last two and a half years?

A. Yes, sir.

Q. You remember the fire at East St. Louis during the night of October 28, 1894?

A. Yes, sir.

Q. Where did that fire occur, in reference to these tracks?

A. Occurred in that building known as the transfer warehouse, in the transfer building, and was located between tracks forty and fifty.

Q. Is it the building through which these two tracks marked red extend?

A. Yes, sir.

Q. I will call your attention to the cars mentioned in the intervening petitions filed herein by the Chicago, Milwaukee & St. Paul Railroad Company, W. W. Cargill & Company, T. McMichael & Son, S. Y. Hyde Elevator Company, Huntting Elevator Company, Jacob Rau, Gilchrist & Company, Henry Rippe, Carr, Ryder & Engler Company, and ask you if the cars mentioned and described in those petitions were at the time of the fire on the tracks marked red on this blue print?

A. Yes, sir.

Q. Now you have a list of these cars; will you designate on which track these various cars were standing at the time of the fire, as near as you can?

A. I can give you the track each car stood on; they stood on the

tracks from forty to fifty, and I can give you the individual car numbers and the tracks they were on.

Q. Chicago, Milwaukee & St. Paul cars, number thirty-t-o eighteen?

A. That was on track 42.

Q. Same company, car thirty-five twenty-four?

A. Track 45.

Q. Same company, forty-one twenty-six?

A. Track 40.

Q. Same company, sixty-three sixty-four?

A. Track 41.

Q. Same company, thirty-seven twenty-eight?

A. Track 43.

Q. Same company, sixty-eight forty-two?

A. Track 43.

84 Q. Same company, eleven fifty-four?

A. Track 40.

Q. Same company, twelve thirty-two?

A. Track 44.

Q. Same company, thirty-seven five naught six?

A. Track 43.

Q. Same company, eleven hundred?

A. Track 42.

Q. The same, twenty-four thirty?

A. Track 44.

Q. The same, twenty-five ninety-eight?

A. Track 41.

Q. The same, six eighty?

A. Track 40.

Q. The same, twelve?

A. Track 42.

Q. The same, ten five thirty-six?

A. Track 42.

Q. The same, ten seven twenty?

A. Track 43.

Q The same, 10071?

A. Track 43.

Q. The same, eleven eight thirty-six?

A. Track 41.

Q. The same, twelve eight eighty-six?

A. Track 41.

Q. The same, fifteen nine forty-four?

A. Track 41.

Q. The same, sixteen five naught two?

A. Track 40.

Q. The same, seventeen two seventy-two?

A. Track 40.

Q. The same, eighteen one twenty-six?

A. Track 43.

Q. The same, twenty naught twenty-two?

A. Track 41.

Q. The same thirty-one naught nine eight?
A. Track 42.
Q. The same, thirty-one two naught four?
A. Track 42.
Q. The same, thirty-two one nine four?
A. Track 44.
Q. The same, thirty-two nine eight six?
A. Track 42.
Q. The same, thirty-three naught nine naught.
85 A. Track 41.
Q. The same, thirty-three one three four?
A. Track 40.
Q. The same, thirty four nine naught eight?
A. Track 44.
Q. The same, thirty-four five seven four?
A. Track 44.
Q. The same, thirty-eight one naught eight?
A. Track 43.
Q. The same, forty-three naught eight naught?
A. Track 43.
Q. The same, forty-three two twenty-two?
A. Track 41.
Q. Forty-six naught sixty-four, the same?
A. Track 41.
Q. The same, forty-six nine nine two?
A. Track 42.
Q. Rock Island and Peoria Company, car number a thousand and four?
A. I can't say what track that was on; that car arrived on train thirty-seven, and it was not set on these tracks till after our record was taken, so I am not able to say.
Q. Are you able to say it was on one of those red tracks?
A. Yes, sir.
Q. C., B. & Q. Company, car number ten eight fourteen?
A. On track 41.
Q. The same company, eleven nine sixty-two?
A. Track 41.
Q. The same, fourteen three eighty-five?
A. Track 41.
Q. The same, nineteen nineteen?
A. Track 41.
Q. St. Louis, Belleville & Southern Illinois Company, car numbered twenty nine seven five (20975)?
A. On track 41.
Q. Is each one of these tracks that you have given the number of, on which these cars were standing, some one of the tracks designated on this map as colored red?
A. Yes, sir.
Q. Tracks set apart and commonly used by the receiver for his cars.
A. Yes, sir.

Had any waybill or direction of any kind whatever been given by the receiver of the C., P. & St. L. to the Terminal Railroad Association of St. Louis, with respect to any one of these cars you have located, up to the time of the fire?

86 A. No, sir.

Q. What was the custom in respect to handling these cars set out on these tracks, after they had been set there, on the part of the Terminal Association?

A. We had nothing to do with them at all until we received waybills if they stood there till doomsday.

Q. What did those waybills indicate?

A. Indicated what distribution was to be made of the shipment, and we were governed accordingly, and sent the car as directed.

Q. Until you got those waybills, what did you do with these cars?

A. Did nothing; let them stand.

Q. Did you receive any waybills from the receiver during the day of the twenty-eighth of October, 1894?

A. Yes, sir.

Q. Where were those cars standing for which you received waybills that day?

A. On those tracks marked in red.

Q. Have you a list of the cars for which you received waybills on the twenty-eighth of October, 1894, cars standing on these tracks marked red?

A. Yes, sir.

Mr. WARREN: Cars in this controversy?

Q. No, sir.

(Objection.)—Then we object.

Q. The purpose is to show that on that day they did give shipping directions in respect to other cars standing on those tracks.

The MASTER: Only important as showing custom; let it go in.

Mr. WILSON: Subject to objection.

The MASTER: Of course.

Q. You may answer.

A. Yes, sir.

Q. State what cars you received waybills for on that day.

A. Car numbers?

Q. Yes, sir.

A. Ninety-six ninety-four, Iron Mountain; two ninety-six, J. S. E.; twenty one hundred C., M. & St. P.; forty two naught three C., P. & St. L.; eleven one eighteen L. & N.; fifty six seventy nine M. & O.; six seventy C. P.; ten two nine eight I. C.; two nine six J. S. E.; ninety six ninety four Iron Mountain—a case of duplication; seven ten C. P.; thirteen naught naught seven M. P.; seventy one forty two M. P.; eleven seventy seventy two I. N.; two naught four one M. P.; nineteen sixteen C. P.; twelve eighty seven C. P.; fourteen sixty five J. S. E.; one fifty one H. C. A. & N.; seventy three

87 sixty three S. F.; twenty seven sixty I. C.; thirty one eight seventy two C. M. & St. P.; forty two G. B. H.; sixteen five sixty two C. M. & St. P.

Q. For these cars you have just given the numbers of, you received waybills on the twenty-eighth of October, 1894?

A. Yes, sir.

Q. What did you do after receiving those waybills, with respect to those cars?

A. Cars carried out as usual to their proper connections or destinations.

Q. Following the directions of the waybills?

A. Yes, sir; in accordance with the instructions.

Q. Was this service rendered by the Terminal Association in breaking up the train of the receiver when it came in on the "M" and placing the cars on these tracks marked red, a separate and distinct service from the work you did after receiving the waybills?

(Objection.)—Leading.

The MASTER: Don't think it is objectionable.

A. It was a separate and distinct service.

Q. Explain how and why.

A. We received for this service, taking care of the cars for which we had waybills—a separate revenue.

Q. Separate from what?

A. From making and breaking up trains.

Q. When a train came in on the "Y" and the Terminal Association would break up the train and set the cars on tracks marked red, did you have any knowledge or did the association have any knowledge, where these cars would be assigned?

A. No, sir.

Q. When and how did you get that knowledge?

A. From the waybill received from the agent of the C., P. & St. L., or the receiver at East St. Louis.

Q. Do you know who took care of these cars which I read to you, after the fire?

A. The receiver of the C., P. & St. L.

Q. Who took care of the contents of those cars?

A. Agents of the receiver of the C., P. & St. L.

Q. What did the contents consist of?

A. Principally barley and hard coal, so far as I remember.

Q. Principally barley in the cars I have read of to you, was it not?

A. Yes, sir.

Q. Was that a total destruction of the barley in these cars?

A. There was some little salvage.

Q. Who took care of this barley not destroyed?

88 A. Agent of the receiver of the C., P. & St. L.

Q. In what way?

A. If my recollection is correct, they gathered it up and made some disposition of it, but I couldn't say what.

Q. Was there any transfer of any of the barley in any of those cars to other cars?

A. Cars partly burned, contents transferred to other cars.

Q. How was that done?

A. Cars placed empty on adjoining track and contents transferred from car to car.

Q. Who did the work of that transfer?

A. C., P. & St. L. receiver's agent.

Q. Who moved the cars?

A. The Terminal Railroad Association placed the cars for transfer opposite.

Q. At whose suggestion?

A. Request of the agent of the C., P. & St. L.

Q. Charge for the service?

A. We made a bill for it; I presume it is paid, I can't say; bill never returned to us, and the presumption is strong that it was paid.

Q. Take Rock Island and Peoria car number a thousand and four, loaded with sash, doors, and blinds; what was done with that after the fire?

A. The agent of the receiver of the C., P & St. L. offered us a waybill for the car, but we declined it.

Q. That was after the fire?

A. Yes, sir; the day following the fire; the car was then under their instructions placed for transfer opposite an empty car.

Q. Who placed it there?

A. The Terminal Association.

Q. At whose request?

A. Under the instructions of the agent of the receiver of the C., P. & St. L.

Q. That service paid for?

A. Made a bill and sent it into general office; presume it was paid.

Q. At this point, at and prior to the time of the fire, what was termed a junction point existed between the two companies. Were there—were junction reports made with respect to the exchange of cars?

A. Yes, sir; that is the custom between all connecting lines interchanging cars with other lines.

Q. Was this, then, what was termed a junction point?

A. Yes, sir; made junction reports of all cars delivered to connecting lines.

89 Q. Was there a yardmaster at this point, at this yard?

A. Terminal Railroad Association had one.

Q. Did the receivers have an agent at East St. Louis?

A. Yes, sir.

Q. Do you know what the practice is in reference to one railway company reporting to another company the delivery of cars by and to some other company when delivered at a junction point?

A. Yes, sir.

Q. You may state what the custom is in respect to the delivery of cars; for instance, a train of the receiver comes into East St. Louis with several cars of the C., M. & St. P. Company. What is done by the receiver in reporting those cars of the St. Paul Company when it makes delivery of them to the Terminal Railroad Association?

A. I can only answer on presumption.

(Objection.)

Q. I don't want you to answer unless you know.

A. I know nothing of the agent of the receiver's plan of doing business with regard to junction reports.

Q. Do you know there is a custom of making those reports?

A. Yes, sir.

Q. Didn't you make those reports yourself for the Terminal Railroad Association, when you delivered cars to other connections?

A. Yes, sir; made junction reports.

Q. Don't you know that custom prevails at all junction points between all companies?

A. Yes, sir.

Q. What is that custom with respect to the case I cited to you, assuming there was such a connection—a train of cars coming into East St. Louis over the receiver's line as I stated?

A. Based on my experience, I should say the custom would be, when they actually delivered the car to the Terminal Association by furnishing forward instructions, they would send a junction card to the car accountant of the C. & St. P.

Q. When would those junction reports be made with respect to the delivery of the waybill to you?

A. On the same day as the delivery of the waybill.

Q. Would those reports be made to the St. Paul road in case of that kind, if the cars were simply put on the tracks marked red and no waybill delivered to you?

A. Should not be made.

Q. You say not the custom?

A. Yes, sir; I should say so.

Q. Then what is the custom?

A. To report the delivery of those cars when they give the Terminal Association the billing.

90 Q. You mean the waybill?

A. Yes, sir.

Q. I hand you here a list of cars marked Exhibit of the C., M. & St. P. Railroad Company, containing numbers and dates when the cars arrived at East St. Louis and the dates at which they were delivered to the Terminal Railroad Association, and ask you if those numbers and dates of arrival and delivery are correct.

A. Yes, sir; this list was made up at our office under my personal supervision, and I would say the figures given there are correct.

Q. I wish to show that these cars would arrive on these red tracks, and were not delivered until some little time afterward, and the junction report which your agent made to our car accountant was on the same day and corresponded with the day of delivery of the waybill by your receiver to the Terminal Railroad Association.

Mr. WARREN: These cars in controversy?

A. Some of them may be.

(Objection.—Irrelevant and immaterial, as being cars not in controversy.)

Q. I will explain to the master that I offer this to show the custom

which prevailed at this place in respect to the business; for instance: Here were several cars which belonged to the St. Paul Company arriving at these tracks, marked red, at various dates, and they were afterwards delivered to the Terminal Railroad Association by the delivery of the waybill by the receiver to the Terminal Association, and on the very day that the waybill was delivered, that day the agent of the receiver reported the delivery of the car to the St. Paul Company, and until that report was made the St. Paul Company, of course, would charge the receiver with the possession of the car for all practical purposes. (To witness:) I will ask you whether, with respect to this exhibit, Is the date of billing correctly given there?

(Objection.—Same objection.)

A. Yes, sir.

(Paper offered and marked Exhibit "C.")

Cross-examination by Mr. WILSON:

Q. Does this memorandum, or exhibit, show for what purpose the car was delivered, whether for the purpose of being sent to some other point or destination?

A. No, sir; that exhibit simply shows the time the cars arrived at East St. Louis by the receiver's line and the time of the delivery of the cars; that is the time they gave us the waybill.

91 Q. Does that exhibit indicate in any way the destination of the cars?

A. No, sir.

Q. These various tracks marked in red which you have referred to by number, do not appear to be numbered on the blue print; are you able to state by number the two tracks that passed through the building designated on the blue print as the freight transfer of the Terminal Railroad Association?

A. Yes, sir.

Q. What were those numbers?

A. Tracks 42 and 43.

Q. Did you state in your examination-in-chief that these tracks were used exclusively by the receiver?

A. No, sir; the question was, commonly, and I answered yes.

Q. State whether they were or were not in the exclusive use of the receiver.

A. They were and were not; at times we stored a few cars there for our own purposes, but these tracks from forty to fifty offered more room that was allotted to the receiver. Under the agreement we gave them room for 150 cars and these tracks would hold over 200; while we stored some cars of our own, we did not intrude on their room.

Q. Then they were at the option of the use of the Terminal Association?

A. Only partially so.

Q. They were, then, partially so?

A. Yes, sir.

Q. Who was using the freight-house on October 28th?
A. The Gratiot Warehouse Association, transferring hay.
Q. Who gave them permission?
A. I couldn't say; came from the management, my immediate superior.
Q. Was your immediate superior an officer of the Terminal Association?
A. Yes, sir; the previous witness.
Q. What was the Gratiot Company using it for?
A. For the transfer of hay.
Q. Using the tracks in there too?
A. Only for the time it took to unload the hay and reload it.
Q. As much as that took, then the tracks were being used by the Gratiot Company, were they not?
A. Yes, sir.
Q. Were there any other cars on those tracks on October 28th, that did not belong either to the Chicago, Peoria and St. Louis, or the Gratiot Company?
92 A. Yes, sir.
Q. Whose cars, and by whose authority were they placed there?
A. There was on forty-two, none on forty-three.
Q. By whose authority?
A. By the authority of the yardmaster.
Q. Whose yardmaster?
A. Terminal Railroad Association's.
Q. How many of the cars were there?
A. Seven cars on track forty-two.
Q. Any of those cars burned?
A. No, sir.
Q. Any other cars except Chicago, Peoria and St. Louis cars on the night of the fire on the red track?
A. Yes, sir.
Q. How many others?
A. Well, I can't say exactly.
Q. Say approximately, as near as you can?
A. About twenty-five.
Q. How many of these cars were burned?
A. Two.
Q. How many cars for which the Terminal Association is, in your judgment responsible, were burned in the fire?

(Objection.—Not cross-examination, and not material to the issue.)

A. Thirteen cars.
Q. How many lost in the whole fire?
A. Eighty-three.
Q. I will ask you if it is not a fact that in taking cars out during the progress of the fire, you took out only such of the Chicago, Peoria and St. Louis cars as obstructed access to the other cars?

(Objection.—Immaterial and irrelevant, and not cross-examination.)

A. No.

Q. I will ask you if it is not a fact that in dealing with the fire you were careful to uncouple the Chicago, Peoria and St. Louis cars where they were attached and to take your cars out?

(Objection.—Incompetent, irrelevant and not cross-examination.)

A. I was not present at the fire, but looking over the ground on the following day, I considered that our men had slighted——

Q. Never mind. You say you were not there.

(Objection.—The witness knows what he saw afterwards. I shall insist on the right of the witness to explain.)

93 The MASTER: What he has actually seen he may state.

Q. Go ahead.

A. I was on the ground early in the morning, and I considered our men had slighted our own cars to save those of the J. S. E.; allowed eleven cars to be lost that could have been saved, for which the Terminal Association was responsible, in efforts to get cars away from the burning freight-house—those cars—and I feel sure they did everything to save the C., P. & St. L. cars.

Q. You base that on the fact that eighty-three cars were lost?

A. Understood that they made every effort to get C., P. & St. L. cars away.

Q. How many did they save?

A. I should say forty or fifty.

Q. Do you know of your own knowledge?

A. Forty or fifty that would have been burned up, had they not been drawn away from the building.

Q. Do you know whether that is true of your own knowledge?

A. From the location of the cars as they stood I am satisfied that is true.

Q. In designating these tracks in red on the blue print, and the cars standing upon them, do you do so on your own knowledge or from information derived from others?

A. From the records taken by our yard clerk.

Q. When were the records made up, before, or after the fire?

A. Both before and after the fire; that day and in the morning after the fire.

Q. You speak now about the salvage of certain property; I will ask you if you don't know and did not know, at the time you testified, that the receiver handled those cars and made whatever salvage was made under a specific agreement with the Terminal Association?

A. I know nothing of the agreement at all.

Q. Don't you know that in fact there was an agreement by which the receiver handled the wreck, with a distinct stipulation that it was to be without prejudice to either side?

A. No, sir; I was in a subordinate position and obeyed the instructions of my superior.

Q. All the answers which you made to Mr. Hanson's questions in examination-in-chief, in reference to salvage and so forth, were made strictly within your own knowledge, and not with any knowledge whatever of any agreement such as I have referred to?

A. Questions in reference to salvage?

Q. Yes, sir.

A. My own knowledge; no knowledge with reference to an agreement, whatever.

94 Q. Who handled and supervised the resistance that was made to the fire, and the attempts at salvage made on the night of October twenty-eight, 1894?

A. Gathering up the remains of the cars totally burned, done under the supervision of the agent of the C., P. & St. L., although we had a man with him.

Q. Who fought the fire—you didn't understand my question—who directed the fighting of the fire?

(Objection.)

The MASTER: I think a question as to the police about the yard is pertinent.

A. The question is rather difficult to answer; the person in charge of the yard at night was known as the night yardmaster, and I presume the superintendent of the fire department directed the crews. But in a case of excitement everybody took a hand at fighting.

Q. Can you name who the night yardmaster was, and in whose employ?

A. Named, Mark Shawhan; in the employ of the Terminal Association.

Q. Whose locomotives were used in making the transfers from the tracks nearest the fire?

A. Well, the Terminal engine was there—Merchants' Terminal engine—and I believe the Cairo Short Line engine was in the yard and assisted at the time, I was told.

Q. I am asking only for your own knowledge. At whose request did the Merchants' Terminal and the Cairo short line act?

A. I couldn't say; they were there at the time and making deliveries, and I presume it was only natural they should help all they could.

Q. Do you know as a matter of fact where the fire originated?

A. No, sir.

Redirect by Mr. HANSON:

Q. You were asked to give your conclusion as to how many cars were destroyed that the Terminal Association was responsible for, and you stated thirteen. Why did you state the Terminal Association were responsible for the thirteen?

A. Eleven cars standing on the tracks, nothing to do with the C., P. & St. L. business, moving from one connection to the other.

The others were cars in the C., P. & St. L. yard tracks, shown in red there, and one of them we had received a bill for and the other was a car our men, through an error, had left standing in the C., P. & St. L. tracks.

Q. This car left by error, was it a C., P. & St. L. car?

95 A. No, sir; a car moving from one line to another.

Q. And by error got onto their tracks?

A. Yes, sir.

Q. The other car you had received a bill for and had not removed.

A. Yes.

Q. The balance you were not responsible for—how many?

A. Balance of eighty-three.

Q. Why didn't you regard the Terminal Association as responsible for those?

A. Never received any instructions or bills for them and had no idea where they went to; consequently could not be moved.

Q. So as between the two companies doing the business there, the Terminal Association was not regarded as in the care and custody of the cars until waybills had been received from the receiver?

A. No, sir.

Cross-examination by Mr. WILSON:

Q. That the reason you didn't remove them?

A. I believe I stated we made all effort to remove them; the man managing the engine knew nothing about the cars we had bills for, and his idea was to get all the cars away from the fire as soon as possible.

Q. Certain of that?

A. Yes, sir.

Q. Although you were not there?

A. No, sir; but from what I saw after the fire.

Q. Know whether the Terminal Association paid for the eleven cars?

A. Of my own personal knowledge, I don't know.

Q. In the usual course of business, do you?

A. No way to ascertain except by making inquiries.

Q. Your attention ever been called to the fact whether you accepted the claim with reference to the eleven cars?

A. No, sir; I made my report on the loss of them.

Q. You consider you were responsible?

A. For those thirteen?

Q. Yes, sir.

A. For those, I considered the Terminal Association responsible.

Q. Stood on the red tracks?

A. No, sir; only two of them; they were in another portion of the yard.

96 Redirect by Mr. HANSON:

Q. The cars of the receiver commonly stood about this warehouse?

A. Yes, sir.
Q. The fire started in the warehouse?
A. Yes, sir.
Q. More of the cars of the receiver in and about there?
A. Cars of the C., P. & St. L. receiver were in and about there.

Cross-examination by Mr. WILSON:

Q. Explain the theory—the fire started in and about the warehouse?
A. Simply a theory; a presumption it started there, as the house was the place where it was discovered.
Q. What was stored there?
A. Hay.
Q. Anything else besides hay?
A. Not to my knowledge.

Adjourned to 2 o'clock p. m.

Mr. HANSON: I wish to introduce in evidence that petition ("D") which is the stipulation of August 27, 1895, and is marked Exhibit D.

Testimony of W. H. Calvert.

W. H. CALVERT sworn.

Direct by Mr. HANSON:

Q. Where do you live?
A. St. Louis.
Q. What is your business?
A. Agent of the receiver of the C., P. & St. L. at East St. Louis.
Q. Were you such agent prior to the fire, October 28, 1894?
A. I was.
Q. Some time prior?
A. Have been for the past three and a half years.
Q. At the time and prior to the fire did you have what is called a yard clerk at East St. Louis for the reciver?
A. I did.
Q. What were his duties?
A. They were numerous; one of his duties, to locate cars
97 coming to the C., P. & St. L.; in fact, locate any cars over which we have any jurisdiction or which will come to us.
Q. Who was your car accountant?
A. At East St. Louis station, do you mean?
Q. Yes, sir.
A. I have a clerk there; I have several of them.
Q. Who was car accountant for the receiver?
A. Mr. W. R. Bradley.
Q. Do you know what the custom is? Take a company like that of the receiver, what is the custom as to reporting cars at junction points when delivered to connecting lines—custom of the company?
A. Reports made by general car companies, do you mean?
Q. Yes, sir.

A. No, I don't. I presume make junction reports of the car connection.

Q. What is the junction report?

A. Simply a small card giving the date.

Q. That is, if the receiver delivered a car belonging to the C., M. & St. P. to the Terminal Association on the 28th of October, 1894, the receiver would then send one of these cards to the C., M. & St. P. when delivered?

A. Place that with some other company besides the C., P. & St. L.; situation so complicated I can't give an answer.

Q. Isn't it a very simple practice; one company notifying another?

A. It is true; but the question of delivery enters a great deal into the matter. I am not competent to answer that question.

Q. Don't be a lawyer; just take the word "delivery" as it is understood. I am asking what would be done by the receiver in a case of that kind, where there had been a delivery of a Chicago, Milwaukee & St. Paul car?

A. I can't say whether he would report the car on arrival at St. Louis, or how.

Q. If that was a delivery, or if it required something else to constitute a delivery, whenever there was a delivery, a report would be sent to the St. Paul Company, would it not?

A. I presume so.

Q. Now, from whom would Mr. Bradley, the car accountant, get the information to make such a report?

A. Get it from the East St. Louis office.

Q. From your yard clerk?

A. Yes, sir—no, sir; it would come from my office.

Q. So he would get the information from your office (exhibiting a paper obtained from a package in front of Mr. A. M. Gregory)?

98 Mr. WILSON: What is this (examining the paper)?

Q. I want to show that that report was made and presented to the insurance companies.

Mr. WILSON: This is our paper and we object to your using it. We decline to permit you to use that.

Q. Did you make out a statement, Mr. Calvert, and swear to it, containing a list of cars and contents damaged at the fire for the purpose of making a claim on the insurance companies?

A. I made a statement and swore to it, but I don't remember just the wording of my statement at the present time. I wish to say one thing: You question me as to the mode of procedure on general car accounts, but this is another thing; please bear that in mind.

Q. I don't understand.

A. I say that you have been questioning me with reference to the manner in which our general car accountant in Springfield handles his business; don't overlook that matter when you bring up questions with regard to whatever communications I have had on another subject.

Q. Don't know as I will go into that matter if you object.

Mr. WILSON: A paper prepared with reference to insurance—an entirely different phase.

Testimony of W. E. Beacham.

W. E. BEACHAM sworn.

Direct by Mr. HANSON:

Q. What is your business?
A. Car accountant of the Chicago, Milwaukee and St. Paul railroad.
Q. Where do you live?
A. In Chicago.
Q. How long have you been in that position?
A. Entered the service first in 1873.
Q. Never mind giving a history of your service with the road; how long have you been car accountant; for the last three years?
A. Yes, sir.
Q. Located at Chicago?
A. Yes, sir.
Q. What are the duties of a car accountant?
A. To keep a record of the company's rolling stock.
Q. You mean cars?
A. Yes, sir.
Q. For the purpose of knowing where they are?
A. For the purpose of locating them, keeping them together and accounting for them.
99 Q. Are you familiar with the custom which prevailed between railroad companies, their mode of accounting to each other for cars?
A. Yes, sir.
Q. State as briefly as you can to the master what that custom is.
A. The practice is for each road to render a report to the other of all cars delivered to connecting lines.
Q. Give an illustration.
A. Well, for example, if one of the cars is delivered by the Chicago, Peoria and St. Louis to the St. Louis Terminal Association, it is Mr. Bradley's practice, the car accountant of the C., P. and St. L. to make what we call a junction report, to me, showing the date on which that took place.
Q. Giving the number of the car?
A. Number of the car and date of the delivery.
Q. Take these cars in question, some of them starting at Prairie du Chien, Wisconsin, going over the line of the Chicago, Milwaukee and St. Paul Railroad Company, to Rock Island; these cars are consigned to East St. Louis. We deliver them to what line there?
A. We deliver them to the Chicago, Rock Island and Pacific or through that road to the Rock Island and Peoria, and the Rock Island and Peoria take them to Peoria and deliver them through the Peoria and Pekin Union to the C., P. & St. L.
Q. Now, when that was delivered to the C., P. & St. L., you would

be notified by the Rock Island and Peoria Company, would you not?

A. Yes, sir.

Q. When those cars reached East St. Louis and a delivery was made to the Railroad Terminal Association at St. Louis, the Chicago, Peoria and St. Louis would notify you of that delivery, would it not?

A. Yes, sir.

Q. Have you heard and have you gone over the list of cars which I read to Mr. Phelps, commencing with Chicago, Milwaukee and St. Paul car number thirty-two eighteen, and ending with the same company's car, number forty-six nine ninety-two, being thirty-eight cars in all, to be familiar with them?

A. Yes, sir.

Q. Have you any report or notice from the receiver of the Chicago, Peoria and St. Louis Railway Company, of the delivery of any one of these cars to the Terminal Association at St. Louis?

A. No, sir.

Q. Have you gone over each particular car with your reports?

100 A. Yes, sir; I have checked them carefully, and several times.

Q. What do you find?

A. I find in each and every case a delivery by the Rock Island and Peoria to the C., P. & St. L., and there the record breaks.

Q. You have no report from the receiver of the Chicago, Peoria and St. Louis of having delivered them to any connecting line?

A. No, sir.

Q. That is up to October 28, 1894, and including that date?

A. Yes, sir.

Q. Did the receiver of the Chicago, Peoria & St. Louis, on October 28, 1894, report the delivery of any cars of the Chicago, Milwaukee and St. Paul road to the Railroad Terminal Association at St. Louis; if so, what cars, and if you have the notices, please produce them?

A. I have a notice which we call the junction report, signed by W. R. Bradley, the car accountant of the C., P. & St. L., dated October 28, 1894, at Springfield, Illinois, which reads: Report of Chicago, Milwaukee and St. Paul cars delivered to our connections. He gives the numbers of five cars delivered to the Wiggins ferry and three delivered to the Eads bridge, which is the St. Louis Terminal Association of St. Louis; the numbers of these last three cars are twenty-one hundred, sixteen five sixty-two and thirty-one eight seventy-two.

Mr. WILSON: Are those cars in controversy?

Q. No, sir; simply to show the custom which prevailed.

(Objection.)

Q. You say the Eads bridge is the same as what?

A. As the St. Louis Terminal Association of St. Louis.

Q. Is that abbreviation used by car accountants?

A. The bridge was formerly known—bridge across the Mississippi river, and that was the way it was designated in the first place, and they still adhere to that method of designating the destination.

Q. Instead of saying Railroad Association of St. Louis?

A. Yes, sir.

Q. You say you were notified by the car accountant of the receiver that on the 28th of October, 1894, three cars were delivered by him to——

A. The Eads bridge.

Q. Were any more cars delivered on that day by the receiver to the Railroad Terminal Association?

A. I have no report of any.

Q. Mr. Phelps testified this morning that car twenty-one hundred, Chicago, Milwaukee and St. Paul, and car of the same com-
101 pany, sixteen five sixty-two, were delivered by the receiver to the Terminal Railroad Association of St. Louis on the 28th of October, 1894; that is, bills of lading or waybills were delivered by the receiver to the Terminal Association of these two cars on that day; have you any report from the car accountant of the receiver covering those two cars?

A. I have just given those numbers in my previous answer.

Q. Then you did have a report?

A. I have a report of those two cars.

Q. I will offer this report in evidence (marked Exhibit "E"); are these junction reports, besides being customary, made with reference to the rules and regulations of the American Railway Association?

A. I can't say as to that, but I know they are made in conformity to the agreement adopted by the International Association of Car Companies.

Q. By a resolution?

A. Yes, sir; and I believe there is a resolution passed to that effect by the American Railway Association, but I am not certain.

Q. I call your attention to this resolution, adopted on April 13, 1887, by the American Railway Association (reading).

A. That covers the case.

Mr. WILSON: Know whether the C., P. & St. L. is a member of the association?

Q. I was going to ask; do you know whether the Chicago, Peoria and St. Louis is a member of that association?

A. I am not positive, but it is a member of the International Car Companies' Association, which is the same thing.

Q. What you have been testifying to is the long-continued practice and custom as to making these reports?

A. Yes, sir.

Q. I will now show you our Exhibit "C," containing a statement of twenty-four cars of the Chicago, Milwaukee and St. Paul, presented to the witness Felps, showing the car numbers, their initials and date of arrival over the line of the receiver at East St. Louis and also the date of the delivery by the receiver to the Terminal Railroad Association, together with the date of billing; C., M. & St. P.

cars number nineteen seven thirty six, the waybill for the car delivered by the receiver to the Railroad Association on October 20th; have you any junction report from the receiver on that car?

A. Yes, sir; October 20, reported as delivered to the Eads bridge on that date.

Mr. WILSON; Those involved in the fire?

A. No, sir; simply to *simply to* establish the custom.

(Objection.—Irrelevant and incompetent.)

102 Q. That car arrived at East St. Louis, September twenty-third at six fifteen in the evening; did you receive any notice from the receiver in respect to that car before October 20th?

A. No, sir; I didn't receive any other report than the one I received of October twentieth, showing its delivery.

Q. Car forty-six three eighty-six, St. Paul Company, arrived at East St. Louis over the receiver's line of road on the 25th day of September at six fifteen; when did you get notice from the receiver of the delivery of that car out of his possession to any one else?

A. October twentieth.

Q. What did you receive?

A. The usual report of its delivery to Eads bridge.

Q. In whose possession was that car, under the custom and practice which prevailed with reference to keeping the account of cars, up to October twenty?

A. In possession of the C., P. & St. L.

Q. Car charged to that company until you received that notice?

A. Always stand charged so.

Q. That true of car nineteen seven thirty-six?

A. Yes, sir.

Q. It seems car thirty-five naught four, St. Paul Company, arrived over the receiver's road on the twenty-third of September at six fifteen; when did you first get notice of the delivery of that car?

A. October twentieth.

Q. Who was it delivered to?

A. The Eads bridge.

Q. In whose possession was it up to that time?

A. C., P. & St. L.

Q. Charged to that company by the St. Paul Company?

A. Yes, sir.

Q. Fifteen three seventy, St. Paul Company, arrived at East St. Louis on the second day of September, at five fifty in the evening; when did you receive notice of that car?

A. October twenty-second.

Q. Any report of the delivery of that car out of the possession of the receiver before that?

A. No, sir.

Q. To whose possession was it charged?

A. Chicago, Peoria & St. Louis.

Q. These reports you read there are not dates you get them, but the dates when made out?

A. These are the days on which the reports themselves are dated.

103 Q. Car eighty-nine thirty-six, same road, arrived over receiver's line October 14th, at eleven thirty in the evening; receive any notice with regard to that car?

A. October 23d delivered to the Eads bridge.

Q. Car sixty-three fifty-eight arrived at East St. Louis October tenth; when did you get junction report from that car?

A. Report of its delivery to the Eads bridge, dated October twenty-six.

Q. Before that, had you received any notice?

A. No, sir.

Q. Just to wind it up; under this custom the date of billing is the same date that this junction report is made out, as the witness has testified as to these other cars, is it?

(Objection.—A general objection to the relevancy.)

A. Yes, sir.

Q. It is stipulated that the balance of the cars on Exhibit "C" arrived at East St. Louis over the receiver's road on the date mentioned, under the head of date of arrival, and that the junction report, as the witness has testified, was made on the dates mentioned under the head of date of billing—under the head of C., P. & St. L. to Eads bridge; what do you mean by Eads bridge; same as Terminal Association?

A. Same as Terminal Railroad Association, and we use it to distinguish between that bridge and the Merchants' bridge; both are controlled by the same concern.

Q. The date under head of date of billing represents the date of the delivery of the bill of lading to the Terminal Association?

A. So I understand.

Q. Now you testified, you received no junction report of the cars of the C., M. & St. P. of the list I read this morning, commencing with C., M. & St. Paul car number thirty-two eighteen and ending same company car number forty-six ninety-two, up to the time of the fire, received no junction report from the receiver?

A. No, sir; received no junction report from the receiver.

Q. As having made any delivery of any of these cars at East St. Louis to any other connection?

A. No, sir.

Q. In whose possession were these cars I have spoken of, these thirty-eight cars, who were they charged to?

A. Chicago, Peoria and St. Louis railroad.

Q. These thirty-seven cars—as I understand—thirty-seven were totally destroyed by fire?

A. Thirty-seven.

Q. In that list of thirty-eight cars, one car, number twelve,

104 was included as destroyed, when in fact it was not, as I understand.

A. It was damaged, but afterwards repaired and returned.

Q. By whom was it repaired?

A. C., P. & St. L.

Q. A number of cars of the C., M. & St. P. damaged but not destroyed at that fire, October twenty-eight, 1894?

A. There were seventeen other cars reported by Mr. Bradley, the car accountant as having been damaged in that fire. (Car.)

Q. I will show you a telegram you sent to Mr. Bradley, November 1st, and his reply November 2d, and I will ask you whether that was sent and whether that was the reply you received.

A. Yes, sir; that is the telegram and that is his letter in reply, enclosing the list of cars.

Q. I offer that in evidence. (Marked Exhibit "F.") These seventeen cars reported as damaged, in whose possession were they at the time they were damaged?

A. C, P. & St. L.

Q. Had you received any junction reports with respect to any one of those seventeen cars from the accountant of the receiver as having been delivered to any connection, October 28th or prior?

A. No, sir.

Q. Do you know what was done with these seventeen cars by the receiver, with respect to taking charge of them after the fire and repairing?

A. They were repaired.

Q. Were they afterwards——

A. Subsequently returned to us.

Q. So these seventeen cars were returned repaired?

A. Yes, sir; put in good repair by Mr. Hemphill.

Q. Who was Hemphill?

A. Master car-builder of the receiver.

Q. Repaired by him?

A. Yes, sir.

Cross-examination by Mr. WILSON:

Q. You say the cars in this list of which you have made an exhibit were in the possessson of the Chicago, Peoria and St. Louis Railway Company, or its receiver, on October 28, 1894; what ground have you for making that statement—how do you know it?

A. By reports.

Q. You did have a report then of the car accountant of the receiver of the Chicago, Peoria and St. Louis touching these cars?

105 A. No, sir.

Q. Whose report did you have then, upon which you predicate your distinct and specific statement that they were in the possession of the Chicago, Peoria and St. Louis on that date?

A. Report of the Rock Island and Peoria railroad.

Q. I object then, Mr. Master, and make a motion to strike out that portion of the testimony of this witness, in which he specifically states the cars covered by this list were in the possession of the receiver of the Chicago, Peoria and St. Louis on this date, upon the

ground that the witness now states it was upon hearsay evidence and not upon any personal knowledge of his own.

The MASTER: I overrule the motion.

Q. We except to that ruling; as a matter of fact, Mr. Beacham, were you at East St. Louis on the 28th of October, 1894, so as to have or obtain any personal knowledge of the physical possession of these cars, whether in the possession of the Chicago, Peoria and St. Louis or not?

A. No, sir.

Q. Of your own immediate personal knowledge do you know anything about the question as to where these cars were on that day?

A. My personal knowledge; no, sir.

Q. Did you have any report from Bradley, the car accountant, or any of the agents of the receiver, touching the cars lost or damaged at East St. Louis, except those that you have offered in evidence?

A. No, sir.

Mr. HANSON: I offer those reports in evidence.

(Objection; as irrelevant and incompetent.)

(Marked Exhibit "G.")

Testimony of George H. Phelps.

Mr. PHELPS recalled.

Direct by Mr. HANSON:

Q. There were seventeen cars of the Chicago, Milwaukee and St. Paul reported by the car accountant of the receiver, under date of November 2, 1894, to the car accountant of the Chicago, Milwaukee and St. Paul, as having been damaged by the fire of October 28, 1894, at East St. Louis; have you examined the records, and can you state whether those seventeen cars were on the tracks marked on that plat with red ink, at the time of the fire?

A. Yes, sir.

Q. Can you state when those cars arrived at East St. Louis?

A. Yes, sir.

106 Q. Go on and state the number of the car and the date of arrival.

A. Car one seventy-eight M. & N. arrived in East St. Louis October twenty-four; number twelve, C., M. & St. P. arrived October twenty-fifth; forty-two sixty-eight, C., M. & St. P., arrived October twenty-sixth; same company, fifty-nine naught six, October twenty-seventh; the same, seventy-two eighty-six, October twenty-seven; the same, seventy-five fifty-two, October twenty-seven; the same, fifteen two fifty-four, October twenty-four; the same, sixteen eight naught two, October twenty-fifth; the same, seventeen eight sixty-eight, Oc-

tober twenty-eight; the same, thirty thousand two hundred and ninety, October twenty-eight; the same, thirty-one nine fifty, October twenty-fourth; the same, thirty-six naught eighty-eight, October twenty-six; the same, forty-three two sixty-four, October, twenty-eight; the same, forty-five nine sixty-four, October twenty-eight; the same, forty-six six fifty-eight, October twenty-fourth; the same, forty-seven six fifty-four, October twenty-seven; 44562, October 27th.

Q. Were any waybills delivered by the receiver for any of these cars to the Terminal Association?

A. No, sir.

Q. Now, right in that connection I want to ask Mr. Beacham a question.

Testimony of W. E. Beacham.

Mr. BEACHAM recalled.

Direct by Mr. HANSON:

Q. With respect to these seventeen cars damaged but not destroyed, just mentioned, were there any junction reports made by the receiver to the St. Paul Company as having delivered these cars to the Terminal Railroad Association?

A. No, sir.

Q. Or anybody else?

A. No, sir; subsequently——

Q. I mean October twenty-eighth and prior thereto.

A. No, sir.

Cross-examination by Mr. WILSON:

Q. I wish you would complete that statement beginning with the word subsequently, from which you *would* cut off.

A. Subsequently the cars were repaired, and then they went through the regular channel, and the reports followed.

107 *Testimony of George H. Phelps.*

Mr. PHELPS recalled.

Direct by Mr. HANSEN:

Q. I want to ask with respect to the following C., B. & Q. cars, ten eight fourteen, eleven nine sixty-two, fourteen three eighty-five, nineteen nineteen, whether any waybills had been delivered to the Terminal Association by the receiver prior to and including October twenty-eight, 1894?

A. No, sir.

Q. You would say it also, with reference to the St. Louis, Belleville and Southern Illinois car, twenty-nine seventy-five?

A. A case just the same, no waybill delivered.

Q. Now, if there had been a waybill delivered for any one of these C., B. & Q. cars, or for the St. Louis, Belleville & Southern Illinois car, or for any one of the thirty-seven C., M. & St. P. cars, while they were standing on the tracks marked red, what would have been done by the Terminal Association with respect to those cars?

A. The cars would have been taken out of that yard and forwarded as per instructions on the waybill.

Q. Is this custom which you have testified to the custom you have worked under—with the receiver, under the agreement introduced in evidence, with reference to switching cars and delivery of cars after you got the waybill?

A. Yes, sir.

Cross-examination by Mr. WILSON:

Q. If the cars were destroyed by fire, how could they have been delivered to you?

A. Couldn't have been delivered after the destruction of the cars.

Q. How do you know, in point of fact, that these cars, about which you have been examined, were not delivered to the Terminal Association?

A. For the simple reason that no waybills had been furnished, and we could not move them, and the delivery of the car is not complete until the waybill is furnished.

Q. I will ask you if your engine did not handle those cars?

A. Had handled them on arrival, in breaking up the train, for which we were paid.

Q. I will ask you if you didn't take possession of them in that way?

108 A. Can't say we did.

Q. You say you didn't take possession of the cars?

A. That is what I say, yes, sir.

Q. Did you know personally about each of these cars, as to whether they had been, or not, delivered?

A. Consulted the records.

Q. Who made the records?

A. Clerks in our employ.

Q. I asked you as to whether you knew personally as to whether these cars had been delivered to the railroad association.

A. Personally, I can't say, of course.

Mr. WILSON: I would like to call the attention of the master to the subject of the statement of appearances in this case.

The MASTER: Yes, sir; it is proper that the appearance should be stated.

Mr. HANSON: For the petitioners appear George P. Cary and Burton Hanson.

Mr. WILSON: For the receiver Bluford Wilson and P. B. Warren; but, if your honor please, the record should also show that Mr. Watts, counsel for the Terminal Association of St. Louis, was present during the examination of all the witnesses, and was consulted

by counsel for the petitioners. I ask that the record should call the attention of your honor to that fact. From our standpoint, the question is whether the receiver of the Chicago, Peoria and St. Louis, or the Terminal Railroad Association of St. Louis, is the guilty party.

The MASTER: I have no knowledge of Mr. Watts' connection with this matter.

Mr. WILSON: I state to the master that Mr. Watts is general counsel for the Terminal Association, and I call your attention to the fact that he has been in consultation with Mr. Hanson and Mr. Cary, who represent the petitioners in this case.

The MASTER: I will receive your communication, and give it whatever attention it may seem to require.

109 *Testimony of A. M. Gregory.*

A. M. GREGORY sworn.

Direct by Mr. HANSON:

Q. You are the claim agent of the receiver in this proceeding?
A. Yes, sir.
Q. Have you in your possession among the papers in this claim a sworn statement of the loss, which was made for the purpose of presenting the claim to the insurance companies?
A. Yes, sir.
Q. Will you produce that statement?

Mr. WILSON: I decline on behalf of the receiver to produce the statement, made up with reference to another matter.

Q. I offer that statement in evidence, a statement made by Mr. Calvert, agent of the receiver at East St. Louis, and sworn to, which states among other things that the cars in this controversy, the property in controversy, was on the tracks of the Terminal Railroad Association; which tracks were used by the receiver in handling its cars.

Mr. WILSON: I object, Mr. Master, to the version of Mr. Hanson, as to the contents of the papers he proposes to introduce; and if he has such a paper, and it is in his possession, that is another question.

Q. The paper is in the possession of the witness.

The MASTER: I don't think you are entitled to state the contents of the paper, and I don't think you are entitled to the paper, unless you have given proper notice and demand.

Q. You have that paper in court, have you, Mr. Gregory?
A. The original is in the possession of the receiver of the road.
Q. In fact, in whose possession is it now?
A. I think it is here in court.

Q. I think the rule is, where a paper is in court before the witness, the court can direct him to produce it.

A. It is not under my control; all of those papers are under the control of the receiver of the road.

Q. In the hands of your attorney, is it not?

A. It is.

Q. I now ask the master to direct the witness to produce the paper?

Mr. WILSON: I call attention to the fact that the witness states the papers are not under his control, but under my control as general counsel for the receiver. While I am not admitting
110 there is anything whatever in these papers that would in any degree prejudice the case of the receiver, I avail myself of my legal right not to give it to the other side, except upon proper notice and due description of its contents.

Q. These papers have been with the claim papers in your office all the time?

A. Have been back and forth; I considered they were in the possession of the receiver.

Q. But in fact they were in your possession, in your office?

A. A portion of the time, and a portion of the time in the counsel's office?

Q. You brought them here to the court?

A. Brought them under the direction of the general counsel of the road.

Q. Had them there in your possession until you went on the witness stand?

A. Didn't consider I had possession; I considered the possession of the papers was in the hands of the general counsel of the road, not in my possession at all.

Q. The rule is, when papers are in court it dispenses with any necessity for giving notice?

Mr. WILSON: I decline to produce the paper.

The MASTER: Gentlemen, this is one of the cases in which I prefer the direction of the court should be taken; either I take it or you. Without any preliminary notice or having had an opportunity to consider the question carefully, I would not like to take the responsibility.

Q. To identify the paper, it is a statement made under date of December 22, 1884, sworn to by W. H. Calvert, local agent of the receiver at East St. Louis, and contains a list of the cars and the extent of damage also to the property or contents of the cars. If the master declines to act I will let the matter rest for the present. That is my case, reserving, of course, the privilege of introducing further testimony hereafter if I see fit.

Cross-examination by Mr. WILSON:

Q. State under whose general direction these records were made up, and under whose direction your office is in the organization of the receiver?

A. Under the direction of the general solicitor of the road; my investigation and reports are made up under instructions furnished me.

Mr. HANSON: I also introduce these letters (marked Exhibits "H," "I" and "K").

111 EXHIBIT "A."

Memorandum of an Agreement, Aug. 1, 1892.

Memorandum of an agreement, made this first day of August, A. D. 1892, by and between the Terminal Railroad Association of St. Louis, party of the first part, and the Chicago, Peoria and St. Louis Railway Company, party of the second part, witnesseth:

That whereas, the party of the first part undertakes to give the party of the second part terminal facilities at East St. Louis, Illinois, for the handling of its trains, care of its engines and cars, and the handling and care of its freight, under the following terms and conditions:

First. It is agreed that the party of the first part shall furnish the necessary yard room and track facilities in their yards in East St. Louis, Illinois, as now located, and the necessary switch-engines and yardmen to do the switching of the party of the second part, in the making up and breaking up of all freight trains that depart from, and arrive at East St. Louis, and to furnish storage-room for a reasonable number of cars necessary to properly take care of and handle the business of the party of the second part, not exceeding one hundred and fifty (150) cars at any one time; and the charge for the facilities and the work above named, shall be at the rate of fifty cents (50) per loaded car in and out, except cars on which the party of the first part receives a bridge toll, which will be handled free; empty cars in and out free.

Second. Cars made "bad order" by and during the making up and breaking up of trains of the party of the second part to be repaired by the party of the second part, and the party of the second part shall furnish its own car-inspectors.

All cars made "bad order" outside of the yards set aside for the use of the party of the second part shall be repaired by the party causing the damage.

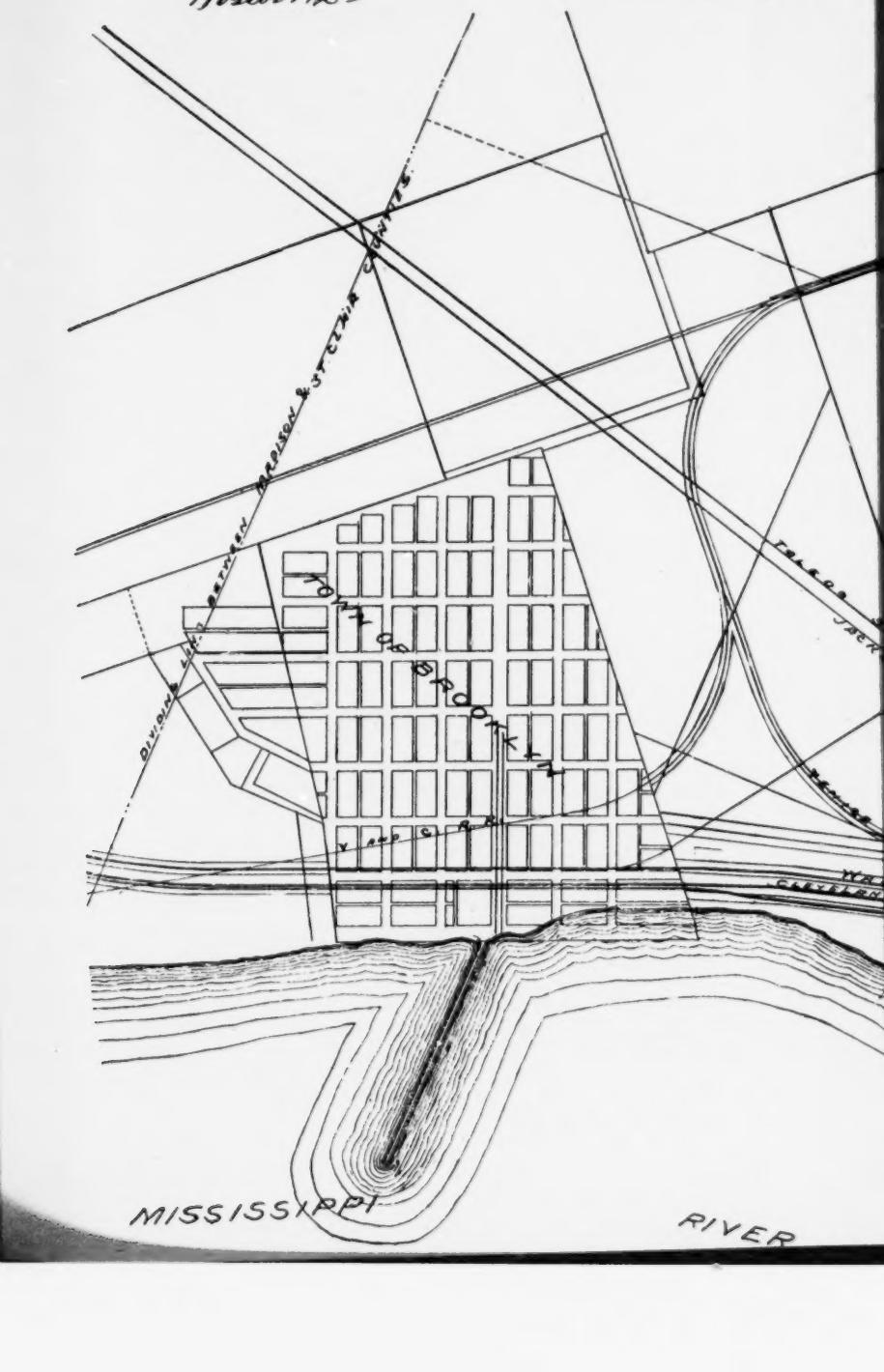
Third. For all loads to and from the National stock yards, the party of the second part is to pay the party of the first part one (1) dollar per car in and out, inclusive of the charge for making up and breaking up of trains, but not the trackage charge at National stock yards.

Fourth. All cars consigned to and from the East St. Louis freight-

No 285.
Raw
Bosworth
} p. 113

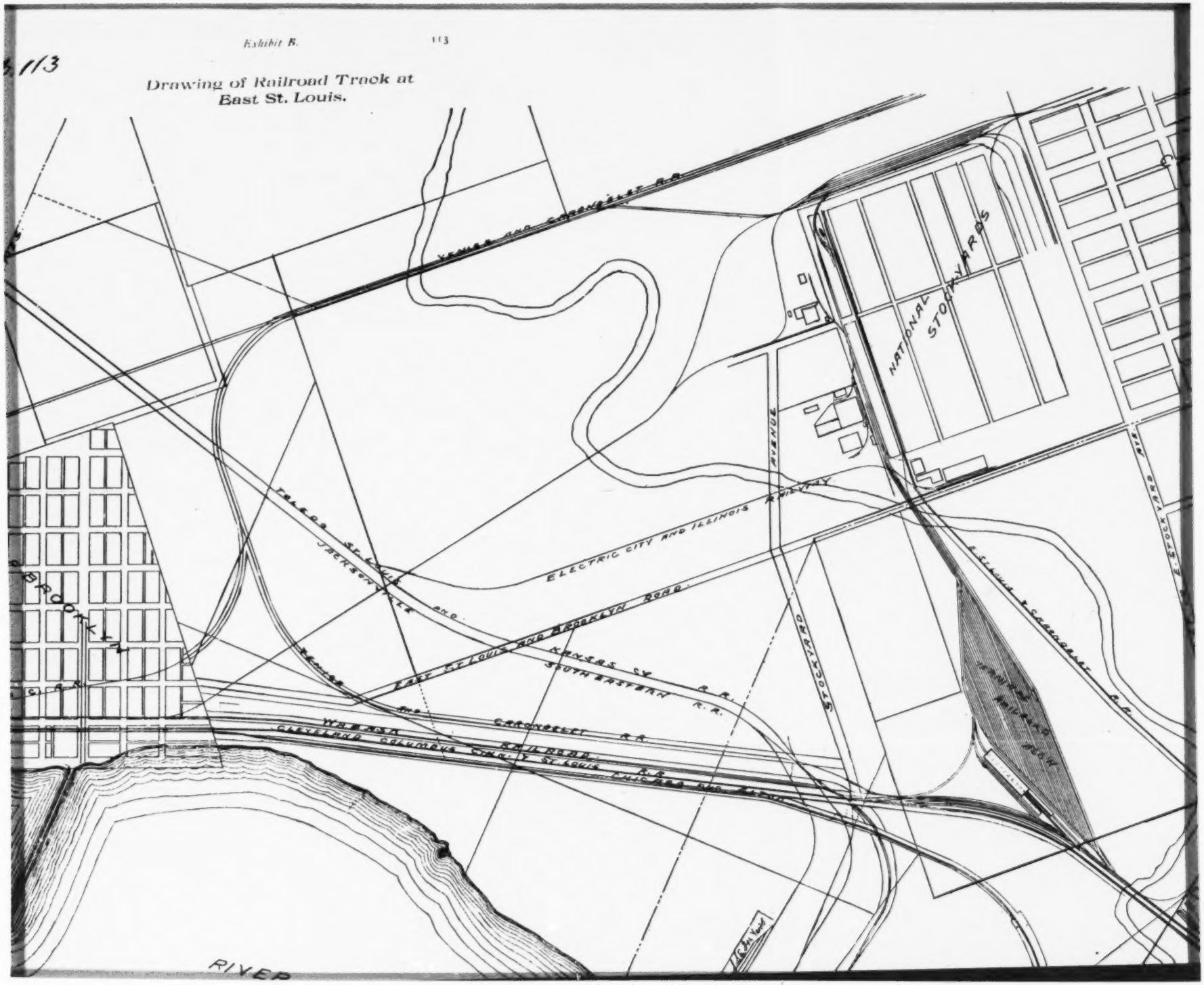
Exhibit B.

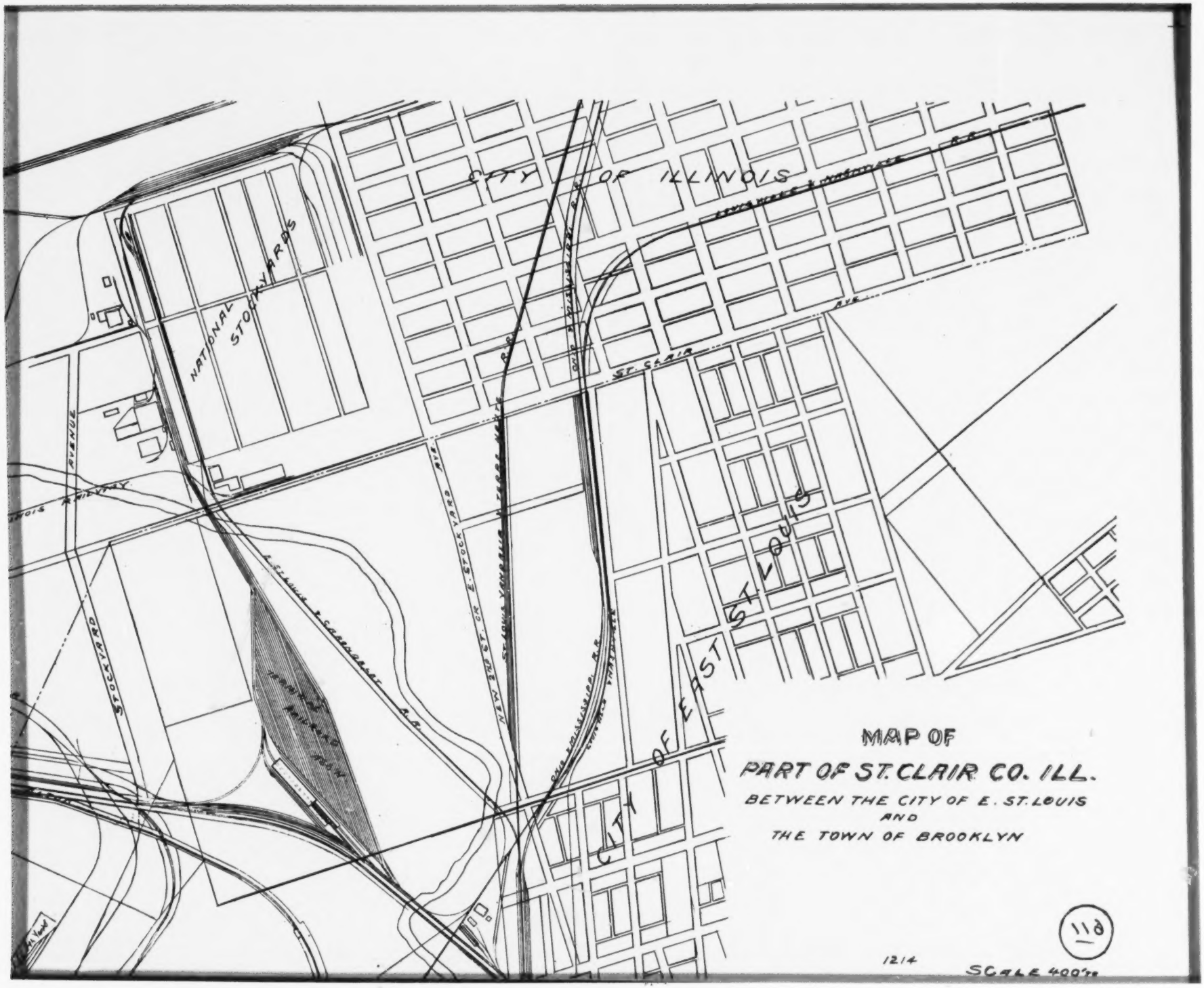
Drawing of Railroad T
East St. Louis.



113

Drawing of Railroad Track at East St. Louis.




CITY OF ILLINOIS
NATIONAL STOCK YARDS
ST. CLAIR AVE
AVENUE
CITY OF EAST ST LOUIS
MAP OF
PART OF ST. CLAIR CO. ILL.
BETWEEN THE CITY OF E. ST. LOUIS
AND
THE TOWN OF BROOKLYN
118
1214
SCALE 400'to

house of the party of the second part, to be switched to and from the Wiggins transfer tracks without extra charge. Regular switching charges and rules to apply on all other cars to and from connections, the party of the first part to be governed in making its collections by instructions shown on billing to it as to who should pay. In the absence of any instructions, the switching charges will follow the car.

112 Fifth. The party of the first part to furnish track room upon which the engines of the party of the second part can be switched and cared for and turned, as may be required; the care of such engines to be under the supervision of the party of the first part; the price for the service rendered to be agreed upon by the master mechanic of the party of the first part and the superintendent of motive power and machinery of the party of the second part.

This contract to be in force from and after the 1st day of August, 1892, and to continue for six months from that date, and to be renewed from time to time, as desired, at the expiration thereof, if satisfactory to both parties.

In witness whereof, the parties hereto have caused the same to be executed in duplicate this — day of ——, A. D. 1892.

TERMINAL RAILROAD ASSOCIATION OF ST. LOUIS,
By J. O. VAN WINKLER,
General Superintendent.

Attest: —— ——, *Secretary.*

CHICAGO, PEORIA AND ST. LOUIS RAILWAY COMPANY,
By W. S. HOOK, *President.*

Attest: MARCUS HOOK, *Secretary.*

(Here follows map marked page 113.)

114 EXHIBIT "C."

Car.	Initial.	Date arrived, J. S. E.	Date delivered.	Bridge.	Date of billing.	C., P. & St. L. to Eads bridge.
19736	C., M. & St. P.	Sept. 23	6.15 p. m.	Oct. 20	Oct. 20	Oct. 20
46386	"	Sept. 25	6.15 p. m.	Oct. 20	Oct. 20	Oct. 20
3504	"	Sept. 25	6.15 p. m.	Oct. 20	Oct. 20	Oct. 20
15370	"	Sept. 22	5.50 p. m.	Oct. 22	Oct. 22	Oct. 22
8936	"	Oct. 14	11.30 p. m.	Oct. 23	Oct. 23	Oct. 23
6358	"	Oct. 10	6.10 p. m.	Oct. 26	Oct. 26	Oct. 26
43348	"	Oct. 11	6.10 p. m.	Oct. 26	Oct. 26	Oct. 26
17262	"	Sept. 25	9.30 a. m.	Nov. 1	Oct. 31	Nov. 1
46010	"	Sept. 22	9.30 a. m.	Nov. 1	Oct. 31	Nov. 1
19614	"	Sept. 24	6.00 p. m.	Oct. 27	Oct. 27	Oct. 27
14998	"	Oct. 2	5.55 p. m.	Oct. 24	Oct. 24	Oct. 24
13974	"	Oct. 10	11.30 p. m.	Oct. 23	Oct. 23	Oct. 23
21676	"	Sept. 30	2.15 p. m.	Oct. 10	Oct. 10	Oct. 10
7302	"	Oct. 2	2.15 p. m.	Oct. 10	Oct. 10	Oct. 10
3644	"	Sept. 19	2.15 p. m.	Oct. 10	Oct. 10	Oct. 10
670	"	Sept. 18	2.15 p. m.	Oct. 10	Oct. 10	Oct. 10
33194	"	Sept. 17	3.40 p. m.	Oct. 13	Oct. 13	Oct. 13
13762	"	Sept. 18	4.35 p. m.	Oct. 17	Oct. 17	Oct. 17
38476	"	Sept. 20	6.35 p. m.	Oct. 2	Oct. 2	Oct. 2
32402	"	Sept. 19	6.35 p. m.	Oct. 2	Oct. 2	Oct. 2
8296	"	Sept. 21	5.00 p. m.	Oct. 5	Oct. 5	Oct. 5
46092	"	Sept. 17	6.35 p. m.	Oct. 2	Oct. 2	Oct. 2
12372	"	Sept. 17	6.35 p. m.	Oct. 2	Oct. 2	Oct. 2
1304	"	Sept. 17	6.15 p. m.	Oct. 6	Oct. 6	Oct. 6
14398	"	Sept. 26	5.50 p. m.	Oct. 8	Oct. 8	Oct. 8
896	M. & N.	Sept. 17	6.35 p. m.	Oct. 2	Oct. 2	Oct. 2

EXHIBIT "D."

Stipulation of Parties as to Making Proof, with Exhibits Thereto.

In the Circuit Court of the United States in and for the Southern District of Illinois.

THE MERCANTILE TRUST COMPANY OF NEW York, Complainant,
vs.
CHICAGO, PEORIA AND ST. LOUIS RAILROAD Company, Defendant.
} Consolidated Cause.

In the matter of the intervening petitions of the Carr, Ryder & Engler Company, Chicago, Milwaukee and St. Paul Railway
115 Company, the S. Y. Hyde Elevator Company, the W. W. Cargill Company, Jacob Rau; James N. Gilchrist and Colin F. Bell, partners under the firm name of Gilchrist & Company; the Huntting Elevator Company, and Thomas McMichael and William McMichael, under the firm name of McMichael & Son, and Henry Rippe.

For the purpose of saving the labor and expense of making proof thereof it is stipulated by the parties to these proceedings as follows, to wit:

1. That the petitioner, Carr, Ryder & Engler Company, is a corporation, as alleged, having its place of business at the city of Dubuque, Iowa, and that on the 20th day of October, 1894, it delivered to the Chicago, Milwaukee and St. Paul Railway Company at said Dubuque, the property mentioned in its petition filed herein, which property was consigned to May & Thomas Hardware Company, Birmingham, Alabama, by way of East St. Louis, Illinois, and was loaded in a car of the Rock Island and Peoria Railway Company, No. 1004, and was to be transported to destination, pursuant to the bill of lading issued therefor, which bill of lading is attached to this stipulation, marked Exhibit "A," and is made part hereof; that while said property was in transit it was destroyed by fire at said East St. Louis on the evening of the 28th of October, 1894; that at the time it was so destroyed the said petitioner was the owner thereof; that said property so destroyed was of the value of seven hundred and seventy-seven dollars and $\frac{28}{100}$ ($777.28), and that said petitioner was damaged in said sum of $777.28 on account of said property having been so destroyed, and that the petitioner is entitled to recover that amount, with interest, if it shall be adjudged that it is entitled to recover in this proceeding.

2. That the Chicago, Milwaukee & St. Paul Railway Company is a corporation, as alleged, having its principal office at the city of Milwaukee, Wisconsin; that on the 28th day of October, 1894, it was the owner of thirty-eight (38) cars mentioned and described in its petition on file herein; that during the evening of said 28th day

of October, the said cars, while on the tracks of the Terminal Railroad Association of St. Louis in its yard at East St. Louis, commonly used by the receiver herein under the agreement between said association and the Chicago, Peoria & St. Louis Railway Company, dated August 1, 1892, were damaged by fire at East St. Louis in the State of Illinois; that each one of said cars was consigned as per bill of lading and waybills introduced in evidence. That the amount of damage to each of said cars, except car No. 12, is as stated in the petition of said company under the heading "Net loss and salvage," and that the total amount of damage to said cars is $9,033.73, which amount the Chicago, Milwaukee & St. Paul Railway Company is entitled to recover, if it shall be adjudged that it is entitled to recover in this proceeding.

116

3. That said petitioner, W. W. Cargill Company is a corporation, as alleged, and that at the dates and times and at the place in its petition mentioned, it delivered to the Chicago, Milwaukee & St. Paul Railway Company four (4) car-loads of barley in cars, as stated in its petition, consigned to the Teichman Commission Company, St. Louis, Mo., via East St. Louis, Illinois. That receipts of which Exhibits B, C, D and E attached to this stipulation are copies, were given by said railway company at the time said barley was received by it for transportation. That said barley was destroyed by fire at said East St. Louis during the night of October 28, 1894; that said barley at the time it was so destroyed belonged to the petitioner and was of the value of twelve hundred and fifty-three dollars and $\frac{23}{100}$ ($1,253.23); that the petitioner was damaged in that sum and is entitled to recover that amount and interest, if it shall be adjudged that it is entitled to recover in this proceeding.

4. That the petitioner The S. Y. Hyde Elevator Company, is a corporation, as alleged, and that at the dates and times, and at the places in its petition mentioned, it delivered to the Chicago, Milwaukee & St. Paul Railway Company six (6) car-loads of barley in cars as stated in its petition, consigned to the Teichman Commission Company, St. Louis, Missouri, via East St. Louis, Illinois. That receipts, the same in form as Exhibits B, C, D & E attached to this stipulation, were given by said railway company at the time said barley was received by it for transportation; that said barley was destroyed by fire at said East St. Louis, during the night of October 28, 1894; that said barley at the time it was so destroyed belonged to the petitioner and was of the value of two thousand one hundred and fifty-four dollars and $\frac{53}{100}$ ($2,154.53): that the petitioner was damaged in that sum, and is entitled to recover that amount and interest if it shall be adjudged that it is entitled to recover in this proceeding.

5. That the petitioner, Jacob Rau, of Wykoff, Minnesota, at the dates and times and at the place in his petition mentioned, delivered to the Chicago, Milwaukee & St. Paul Railway Company two (2) car-loads of barley in cars as stated in his petition, consigned to the Orthwein Grain Company, St. Louis, Missouri, by way of East St. Louis, Illinois; that receipts, the same in form as Exhibits B C D and E attached to this stipulation, were given him by said rail-

way company at the time said barley was received for trans-
117 portation; that said barley was destroyed by fire at said East St. Louis, during the night of October 28, 1894; that said barley at the time it was so destroyed belonged to the petitioner and was of the value of eleven hundred, forty-four dollars and $\frac{7}{100}$ ($1,144.07); that the petitioner was damaged in that sum and is entitled to recover that amount and interest, if it shall be adjudged that it is entitled to recover in this proceeding.

6. That the petitioners, James N. Gilchrist and Colin F. Bell, are partners under the firm name of Gilchrist & Company, engaged in business at McGregor, Iowa, and that at the dates and times and at the place in their petition mentioned, they delivered to the Chicago, Milwaukee & St. Paul Railway Company two (2) car-loads of barley in cars as stated in their petition, consigned to the Teichman Commission Company, St. Louis, Missouri, by way of East St. Louis, Illinois; that receipts, the same in form as Exhibits B, C, D and E attached to this stipulation, were given to them by said railway company at the time said barley was received for transportation; that said barley was destroyed by fire at East St. Louis during the night of October 28, 1894; that said barley at the time it was so destroyed belonged to the petitioners, and was of the value of eight hundred and five dollars ($805); that the petitioners were damaged in that sum and are entitled to recover that amount and interest, if it shall be adjudged that they are entitled to recover in this proceeding.

7. That the petitioner, The Huntting Elevator Company, is a corporation, as alleged, and that at the dates and times and at the places in its petition mentioned, it delivered to the Chicago, Milwaukee & St. Paul Railway Company ten (10) car-loads of barley in cars, as stated in its petition, consigned to the Teichman Commission Company, St. Louis, Missouri, by way of East St. Louis, Illinois; that receipts, the same in form as Exhibits B, C, D and E attached to this stipulation, were given to it by said railway company at the time said barley was received for transportation; that said barley was damaged and destroyed by fire at said East St. Louis during the night of October 28, 1894; that said barley at the time it was so damaged and destroyed belonged to the petitioner, and the loss and damage thereof amounted to the sum of twenty-six hundred dollars and ninety-five cents ($2,600 95); that the petitioner was damaged in that sum and is entitled to recover that amount and interest, if it shall be adjudged that it is entitled to recover in this proceeding.

8. That the petitioners Thomas McMichael and William McMichael are partners engaged in business at McGregor, Iowa, under the firm name of T. McMichael & Son, as alleged, and that at the dates and times and at the place in their petition mentioned they delivered to the Chicago, Milwaukee & St. Paul Railway
118 Company eight (8) car-loads of barley as stated in their petition, consigned to the Teichman Commission Company, St. Louis, Missouri, by way of East St. Louis, Illinois; that receipts the same in form as Exhibits B C D & E attached to this stipulation,

were given to them by said railway company at the time said barley was received for transportation; that said barley was destroyed by fire at said East St. Louis during the night of October 28, 1894; that said barley at the time it was so destroyed belonged to the petitioner, and was of the value of twenty-nine hundred and forty-two dollars and $\frac{56}{100}$ ($2,942.56); that the petitioners were damaged in that sum and are entitled to recover that amount, with interest, if it shall be adjudged that they are entitled to recover in this proceeding.

9. That the petitioner Henry Rippe of Fairmount, Minnesota, at the dates and times and at the place in his petition mentioned delivered to the Chicago, Milwaukee & St. Paul Railway Company two (2) cars of barley in cars as stated in his petition, consigned to the Orthwein Grain Company, St. Louis, Mo., by way of East St. Louis; that receipts, in form as Exhibits B C D and E attached to this stipulation were given him by said railway company; that said barley was destroyed by fire at East St. Louis during the night of October 28, 1894; that said barley at the time it was so destroyed belonged to said Rippe and was of the value of $1,165.67, and that he is entitled to recover that amount and interest, if it shall be adjudged that he is entitled to recover in this proceeding.

Dated August 27, 1895.

BURTON HANSON &
GEORGE P. CARY,
Attorneys for Petitioners.

BLUFORD WILSON,
Solicitor for Receiver.

EXHIBIT "B."

No. ..... *Station* ..... LA CROSSE, Oct: 20, 1894.

RECEIVED from W. W. CARGILL CO.

in apparent good condition

MARKS AND CONSIGNEE.	DESCRIPTION OF PROPERTY.	WEIGHT
Teichman Com. Co. St. Louis, Mo. Car 15254 Exhibit B.	Via East St. Louis. Bulk Barley.	

As described above, contents and value unknown, to be transported by the **CHICAGO, MILWAUKEE & ST. PAUL RAILWAY CO.**, over the line of this Railroad to ..... ready to be delivered at said warehouse, to the next connecting ..... company or their warehouse at ..... consignee or owner, and if the same are consigned to any point beyond the line of this Company's road ready to be delivered at said warehouse, to the next connecting ..... company or carrier, it being expressly agreed that said property is to be transported upon and in all respects subject to the regulations of the published tariff of said ..... company and to the conditions printed and indorsed hereon, which regulations and conditions form a part of this contract, and the acceptance of this contract is to be deemed evidence of notice of all such regulations and conditions to and of assent thereto by the shipper, consignee and owner of said property, and it being further expressly agreed that this Company assumes no liability, and is not to be held responsible as common carriers, for any loss of, or injury to said property after its arrival at its warehouse aforesaid, or for any loss or damage thereto or any delay in transportation or delivery thereof by any connecting or succeeding company or carrier.

(OVER.)

J. C. HEITBAUS, Agent.

CONDITIONS AND RULES

FORMING PART OF THE WITHIN CONTRACT.

1. The Corporation will not receive or carry any Bank Bills, Drafts, Notes, Deeds Contracts, evidences of debt, writings, or be responsible for their loss or injury.

2. No endorser, or other agent of the Corporation, is authorized to take charge of Bank Notes, Money or other valuable papers or things for carriage, or to receive, ship, carry, or deliver any perishable or rejected articles, or to be responsible for such articles.

3. Pictures, Paintings, Bullion or manufactured articles of gold and silver, or Jewelry, Watches, Plated Articles, Statuary, Musical Instruments, Glass, Silks, Laces will be carried by the Corporation, for the use of which it will be required to pay extra price for the carriage and responsibility for such articles to be paid.

4. Carriages and sleighs, whose Cases, Shackles, Shoes and Castings, Mortise, Locking Glasses, Mineral Axles only be taken at the owner's risk of fracture or injury during the course of transportation, as the loading and unloading thereof unless especially agreed to the contrary.

5. Furniture and household articles of any description will be taken only at owner's risk of breakage and rain. Household furniture especially covered in the contract.

6. Articles will not be received for transportation unless properly packed in suitable Crates, Boxes, Bales or other receptacles for the protection of the property packed, and the Company will not be responsible for any loss or damage to such articles unless the same with the name of the consignee plainly marked thereon, and the charges thereon fully paid. The Company will not be responsible for any damage to such articles occasioned by the breaking of such packages, or by the leakage of the contents thereof, unless such packing, or such leakage without the negligence or fault of the Company or its agents. All property in transitu to consignee when necessary

Goods in bundles will not be considered as properly packed, and the Company will not be responsible for any loss of parts or for the whole of such goods.

The Company is not to be responsible for any loss of parts or of the whole of Carpets, Oil Cloths, or other articles put up in rolls, unless packed in boxes.

The Company will not be responsible for any loss of parts or of the whole of Furniture, Looking Glasses, Pictures, Bedding, Mattresses, Feathers, Upholstery Goods, Trunks, Valises, Bags, Baskets, Bundles, Boxes, Crates, Barrels, Kegs, Packages, Articles or Property of any description, unless the same be packed by the owner or his agent.

7. The Company will not be responsible for the loss of any particular train or connection in time for any particular train, unless specially agreed, but will forward the same with all reasonable dispatch, as the general business of the Company will permit.

8. The Corporation will only be liable as warehousemen, after the property has been placed in their freight depot. But for loss, damage or injury to property by fire, while in their freight depot or warehouse, or in transit, no notice is required.

9. The Corporation will not be responsible for loss or injury happening to or occasioned by the acts of God, the public enemy, mobs, strikes, or the elements, or for leakage, breakage, or any unavoidable accident, or for the loss of property by fire, or for the acts of thieves, or incendiaries, or for the delay or detention of any property, or the consequences thereof, during the transportation of the consignee or consignor, and not as carriers. The Company will not be liable or responsible for any loss, damage or injury to property after the same shall have arrived at the depot of the Company in the city of destination, and the consignee shall have been notified of the arrival of the property, and a reasonable time shall have elapsed for the delivery to the owner or consignee, or his agent, after such notice.

10. Goods or property consigned to any place of the Company's line of road or to any point or place beyond its terminus, will be forwarded by the Company with all reasonable dispatch, but in such case there are no known to the station agent at said warehouse willing to receive the same immediately, for transportation, the Company will not be responsible for any loss, damage or injury to such goods or property, and the Company will not be liable or responsible for any loss, damage or injury to property after the same shall have arrived at the depot of the Company in the city of destination, and the consignee shall have been notified of the arrival of the property, and a reasonable time shall have elapsed for the delivery to the owner or consignee, or his agent, after such notice.

11. The Corporation will not be responsible for loss or damage to any article by fire or other wise, the bulk of which renders it necessary to be forwarded in open cars.

12. Goods or property consigned to any place of the Company's line of road or to any point or place beyond its terminus, will be forwarded by the Company with all reasonable dispatch, but in such case there are no known to the station agent at said warehouse willing to receive the same immediately, for transportation, the Company will not be liable or responsible for any loss, damage or injury to such goods or property, and the Company will not be liable or responsible for any loss, damage or injury to property after the same shall have arrived at the depot of the Company in the city of destination, and the consignee shall have been notified of the arrival of the property, and a reasonable time shall have elapsed for the delivery to the owner or consignee, or his agent, after such notice.

13. No station agent or clerk has authority to alter or vary any of these Rules and Conditions.

All carload freight shall be subject to a minimum charge to Purchase and resale of $1 00 per car for each 24 hours detention or fraction part thereof, after the expiration of 48 hours from its arrival at destination, Sundays and legal holidays excepted, and all carload freight not unloaded within forty-eight hours, Sundays and legal holidays excepted, after the freight in a car is ready for delivery to the consignee, and the Consignee or Consignor shall pay the C., M. & St. P. Ry. Company the expense of unloading and reloading such freight, and the Company shall have a lien upon the freight in addition to its own freight charges and back charges.

1793

1183

120 *Certificate of Evidence.*

EXHIBIT "C."

No...... *Station.*.. LA CROSSE, Oct. 18, 1894.

RECEIVED from W. W. CARGILL.

in apparent good condition .....

MARKS AND CONSIGNEE.	DESCRIPTION OF PROPERTY	WEIGHT.
Teichman Com. Co. St. Louis, Mo. Via E. St. Louis. Exhibit C.	Barley Cars 25452–20186 30500–12856–9630 47654–9168–1100	

As described above, contents and value unknown, to be transported by the CHICAGO, MILWAUKEE & ST. PAUL RAILWAY CO., over the line of this Railroad to their warehouse at.....ready to be delivered at said warehouse, to the consignee or owner, and if the same are consigned to any point beyond the line of this Company's road ready to be delivered at said warehouse, to the next connecting company in carrier, it being expressly agreed that said property is to be transported upon and in all respects subject to the regulations of the published tariff of said company and to the conditions printed and endorsed hereon, which regulations and conditions form a part of this contract, and the acceptance of this contract is to be deemed evidence of notice of all such regulations and conditions to and of assent thereto by the shipper, consignee and owner of said property; and it being further expressly agreed that this Company assumes no liability, and is not to be held responsible as common carriers, for any loss of, or injury to said property, after the arrival at its warehouse aforesaid, or for any loss or damage thereto or any delay in transportation or delivery thereof by any connecting or succeeding company or carrier.

J. C. HEITBAHN, Agent.

(OVER)

CONDITIONS AND RULES

FORMING PART OF THE WITHIN CONTRACT.

1. The Corporation will not receive or carry any Bank Bills, Drafts, Notes, Trade Contracts, evidences of debt, Railroad Tickets, or be responsible for their loss or injury.

No Conductor, or other agent of the Corporation, is authorized to take charge of Bank Notes, Money or other valuable papers or things for an increased compensation, or to receive any perquisites or reward, for or Bullion, or manufactured articles of gold and silver, or Jewelry Watches, Clocks, Plated Articles, Statuary, Musical Instruments, Glass, Silks, Laces, will be carried by the Corporation, for the loss of which it will in writing, against the character and kind of property, and their value, and unless the proper extra price for the carriage and responsibility for such articles be paid.

Carriages and Sleighs, Agricultural Implements, Wagons, Machinery, Stoves and Castings, Marble, Looking Glasses, Mineral Waters, Ales and Liquids put up in glass or earthenware, Cabinet Ware and Furniture will only be taken at the owner's risk of fracture or injury during transportation, and the loading and unloading of any description will be taken only on special terms and conditions, and the Company will not be responsible for any description of freight unless a receipt is taken therefor from the cars and agent.

4. Gunpowder and coal among other goods that will be taken from the cars and agent. In case of damage in consequence of the same being so stowed, the shipper or consignee will be held liable.

5. Articles will not be received for transportation unless properly packed in suitable Cases Box, Barrels or Packages, and each must be well and clearly MARKED with the name of the CONSIGNEE and of the station where they are to be delivered, and the charges will in no case be paid. The Company will in no case be responsible for loss, injury or damage which might have been avoided by ordinary and more careful and sufficient packing, or which originates from the fault or neglect of the consignor or agent in packing or in which originates when necessary.

Glass or Crockery will not be considered as properly packed, and the Company will not be responsible for any loss of parts or of the whole of such package.

No allowance for deficiency of Leakage, Breakage or other fraud, if not covered with canvas will be made.

The Corporation will not be responsible for damage occasioned by delays from storms, accidents, unavoidable causes, or by decay or injury to fruit, fish, dressed poultry or other perishable property, or from injury to property shipped in Steel, Lead or other metal Stock, and the Cartes for any particular market.

The charges on perishable property must always be prepaid.

7. The Corporation will not undertake or agree to carry property by any particular train, nor in time for any particular market, nor any time by which the transportation may be performed, nor will it be responsible for any delay in the non-delivery of such property in any certain train, or at any time at the general business of the Corporation will permit it.

8. The Corporation will only be liable as warehousemen, after the property has been placed in their freight depot. But for loss or damage to property by fire, while in their freight depot or elsewhere, the ordinary rules will be charged for all property not taken from the warehouse within one day after arrival.

10. The Corporation will not be responsible for loss or damage happening to or occasioned by unruly or vicious horses, cattle, or other animals, however caused, to live stock or animals of any description, transported or carried upon their railway, or in their cars or vehicles.

11. The Corporation will not be responsible for loss or damage to any article by fire or other wise, the bulk of which renders it necessary to be in their Company's line of road, or any point or place on the line of the Corporation, at his warehouse within mentioned, will submit for transfer or freight-train, as the agents of the consignee or consignee, and not as carriers, the Company will not be liable at the within mentioned Company's station for delivery to the owner, consignee or to the connecting carriers or freight men for transportation.

13. No station agent or clerk has authority to alter or vary any of these Rules and Conditions.

All carload freight shall be subject to a minimum charge for weighing and of 40 cents per car. All carload freight shall be removed from the depot platform and depot grounds of this road within 48 hours from its arrival at destination, and after the expiration of 72 hours, this Company shall be authority to unload and store the freight in a warehouse of this or of any other company, at the expense of unloading and warehousing same, and for such expense this Company shall have a lien upon the freight in addition to its own freight charges and back charges.

1734

409

EXHIBIT "D."

No. ..... *Station*, LA X, WIS., Oct. 12, 1894.

RECEIVED from W. W. CARGILL CO.

in apparent good condition

MARKS AND CONSIGNEE.	DESCRIPTION OF PROPERTY	WEIGHT.
Teichman Com. Co. St. Louis, Mo.	Cars { 20022 St. P. Bly. 32986 " "	41100 40400

Exhibit D.

As described above, contents and value unknown, to be transported by the CHICAGO, MILWAUKEE & ST. PAUL RAILWAY CO., over the line of this Railroad to their warehouse at ..... ready to be delivered at said warehouse, to the consignee or owner, and if the same are consigned to any point beyond the line of this Company's road ready to be delivered at said warehouse, to the next connecting company or carrier, it being expressly agreed that said property is to be transported upon and in all respects subject to the regulations of the published tariff of said company and to the conditions printed and endorsed hereon, which regulations and conditions form a part of this contract, and the acceptance of this contract is to be deemed evidence of notice of all such regulations and conditions to and of assent thereto by the shipper, consignee and owner of said property, and it being further expressly agreed, that this Company assumes no liability, and is not to be held responsible as common carriers, for any loss of, or injury to said property, after its arrival at its warehouse aforesaid, or for any loss or damage thereto, or any delay in transportation or delivery thereof by any connecting or succeeding company or carrier.

J. C. HEITBAHS, Agent.

(OVER.)

CONDITIONS AND RULES

FORMING PART OF THE WITHIN CONTRACT.

1. The Corporation will not receive or carry any Bank Bills, Drafts, Notes, Bonds, Coupons, Specie, Jewelry, or other articles, or be responsible for their loss or injury.

2. No Conductor, or other agent of the Corporation, is authorized to take charge of Bank Notes, Money or other valuable papers or articles, or to receive the same for safe keeping, or to receive any paper, gold or Silver Coin or Bullion, or manufactured articles of gold and silver, or Jewelry, Watches, Pictures, Plated Articles, Statuary, Musical Instruments, Glass, Glass Ware, Silk or Satin, unless the value thereof is plainly stated in writing, stating the character and kind of articles and their value, and unless the proper extra price for the carriage and responsibility for such articles be paid.

Carriages and Buggies, Show Cases, Machinery, Stoves and Castings, Marble, Looking Glasses, Boxes, Bales or Packages, and every article of Furniture or Implements, Cabinet Ware and Furniture will only be taken at the owner's risk of Breakage or injury, and not otherwise, unless by special contract to the contrary, and the loading and unloading of all articles of any description will be taken only on special terms and at Owner's risk.

4. Grain, Flour and Provisions among other goods that will be taken from the cars and stored, in case of damage in consequence of the same being so stored, the shipper or consignee will be held liable.

5. Articles will not be received for transportation unless properly packed in suitable Cases, Boxes, Bales or Packages, and each must be well and clearly Marked on the outside with the name of the consignee and of the station where they are to be delivered, and the charges thereon will be prepaid. The Company will in no case be responsible for loss, injury or damage which might have been avoided by ordinary and careful and skillful care by the consignee or owner, or for loss or damage by fault of the consignee or owner, or subject to consignee when necessary.

Goods in bundles will not be considered as properly packed, and the company will not be responsible for any loss of parts or of the whole of such packages.

No allowance for deficiency of Lemons, Oranges or other fruit, if not covered with convex will be made.

6. The Corporation will not be responsible for damage sustained by delays from storms, accidents, or other causes, or for damage or injury to fruit, fish, dressed hogs, dressed poultry or other perishable property, or from injury to property, produce or packages, or for loss of time, or for any damage to property by fire, within the limits of the warehouses of the Corporation, and the property will be at the owner's risk from the time it is unloaded from the cars until delivered.

The charges on perishable property must always be prepaid.

The charges on letter-of-marks must always be prepaid.

7. The Corporation will not be responsible for damage sustained by delays from storms, accidents, or other causes, or for damage or injury to fruit, fish, dressed hogs, dressed poultry or other perishable property, or from injury to property, produce or packages, or for loss of time, or for any damage to property by fire, within the limits of the warehouses of the Corporation, and the property will be at the owner's risk from the time it is unloaded from the cars until delivered.

In time for any particular market, nor are limits of time fixed for the transportation of property. In case any particular train will forward the same with as reasonable dispatch as the general business of the Corporation will permit it.

8. The Corporation will only be liable as warehousemen, after the property has been placed in their freight depot. But the Company will be responsible for loss or damage to property by fire, within the freight depot or warehouse, while the same is in transit.

9. Storage at customary rates, will be charged for all property not taken from the warehouse within one day after arrival.

10. The Corporation will not be responsible for loss or injury happening to or occasioned by animals or various horses, cattle or other animals, or for any damage whatever caused to live stock or animals of any description, transported or carried upon their railway, or in their cars or vehicles.

11. The Corporation will not be responsible for loss or damage to any article by fire or otherwise, the bulk of which it is necessary to open for the purpose of delivery to the owner.

12. Books or property consigned to any person at the Company's [illegible] of road, or to any point or station on the line of road, will be delivered with as reasonable dispatch as the general business of the Corporation, at its warehouse within mentioned, will admit, and nothing in the foregoing shall be construed to require the Company to deliver such property at any other time than during the usual hours for the delivery of freight, nor at any other place than the warehouse of the Company at the station, unless the Company shall by its agent or clerk at such station, for the purpose, agree to deliver the same elsewhere.

13. No agent or clerk has authority to alter or vary any of these Rules and Conditions, and no notice given to any such agent or clerk will be deemed notice to the Company unless the same is indorsed and dated on the receipt or bill of lading by the C. M. & St. P. Ry Company the expense of unloading and warehousing same, and for such expense the Company shall have a lien upon the freight in addition to such freight rate or and such charges.

All carload Freight shall be subject to a minimum charge of the rate of freight for the expansion of 24 hours from its arrival at destination, and after the expiration of 24 hours, the Company shall be at liberty to remove the same to the warehouse of the Company at the station, and charge storage thereon as above provided.

1795

110

122

Certificate of Evidence.

EXHIBIT "E."

No. ..... *Station.* LA X, WIS., Oct. 16, 1894.

RECEIVED from W. W. CARGILL CO.

in apparent good condition .....

MARKS AND CONSIGNEE.	DESCRIPTION OF PROPERTY	WEIGHT.
L. Lemcke & Co.	St. P. 17272	40650
St. Louis, Mo.	M. & N. 1232	50400
Exhibit E.	Duplicate.	

As described above, contents and value unknown, to be transported by the CHICAGO, MILWAUKEE & ST. PAUL RAILWAY CO., over the line of this Railroad to its warehouse at ..... ready to be delivered at said warehouse, to the consignee or owner, and if the same are consigned to any point beyond the line of this Company's road ready to be delivered at said warehouse, to the next connecting company or carrier, it being expressly agreed that said property is to be transported upon and to all respects subject to the regulations of the published tariff of said company and to the conditions printed and endorsed hereon, which regulations and conditions form a part of this contract, and the acceptance of this contract is to be deemed evidence of notice of all such regulations and conditions to and of assent thereto by the shipper, consignee and owner of said property, and it being further expressly agreed that the Company assumes no liability, and is not to be held responsible as common carriers, for any loss of, or injury to said property, after its arrival at its warehouse aforesaid, or for any loss or damage thereto or any delay in transportation or delivery thereof by any connecting or succeeding company or carrier.

(OVER.)

J. C. HEITBAHN, Agent.

CONDITIONS AND RULES

FORMING PART OF THE WITHIN CONTRACT.

1. The Corporation will not receive or carry any Bank Bills, Drafts, Notes, Deeds, Contracts, evidences of property or other writings, or be responsible for their loss or injury.

2. No conductor or other agent of the Corporation is authorized to take charge of Bank Notes, Jewelry, Precious Stones, Specie, or other valuable articles, and will not receive or carry any of the same, or permit the same to remain, for himself or for the Company, on or for such articles.

3. No Gold or Silver Coin or Bullion, or manufactured articles of gold and silver, or Jewelry, Watches, Pictures, Plated Articles, Statuary, Musical Instruments, Glass, Furniture, Bronzes, Clocks, Fancy Goods, Perfumery, Cologne, Trimmings, Silks, Satins, Velvets, or other articles of like character, will be carried unless specially agreed for in writing, stating the character and kind of such articles, and their value, and unless the proper extra price for the carriage and responsibility for such articles be paid or agreed for.

4. Glass, Looking Glass, Show Cases, Machinery, Stoves and Castings, Marble, Looking Glasses, Mineral Acids, Sweet Potatoes, all Liquids put up in glass or earthenware, Cabinet Ware and Furniture will only be taken at the owner's risk of fracture or injury during the course of transportation, and the Company will not be liable for any damage to the same, unless caused by the willful misconduct of its agents.

5. Articles will not be received for transportation unless properly packed in suitable Crates, Boxes, Bales or Packages, and each must be well and clearly Marked with the name of the Consignee and of the station where they are to be delivered, otherwise they will not be received, and the Corporation will not be responsible for loss, injury or damage which might have been avoided by its fulfillment of these conditions. All property not delivered at proper by packed, and the Company will not be responsible for any loss of parts or of the whole of such packages.

Goods for export must be ordered as prepaid, and the company will not be responsible for any loss of parts or of the whole of such packages.

No allowance for deficiency of Lemons, Oranges or other fruit. If not covered with canvas will be made.

6. The Corporation will not be responsible for the loss occasioned by delays from storms, accidents or unavoidable causes from injury to property, packed by it or from any other cause arising from any delay or shipment, however occasioned, but they will forward the same with as reasonable dispatch as the general business of the Corporation will permit it.

7. The Corporation will not be responsible for the property it has been placed by the consignee or owner in the cars for loading, but will forward the same with all reasonable dispatch as the general business of the Corporation will permit it.

8. The Corporation will only be responsible for property by it, while in their freight yard or storehouse, the Company will not be liable

9. Storage, at customary rates, will be charged for all property not taken from the warehouse within one day after arrival.

10. The Corporation will not be responsible for loss or injury happening to or occasioned by any cattle, horses, sheep, swine or other animals, or to any property in consequence of the viciousness of the same, nor for any damages however caused, to live stock or animals of any description, transported or carried upon their railway or in their cars or vehicles.

11. The Corporation will not be responsible for loss or damage to any article by fire or otherwise, the bale of which is redirected by the consignee.

12. Goods or property consigned to the care of the Company a bin, of rock, or to any point or station on the line of the Corporation, at its warehouse within mentioned, will admit for carrier or freighthaul, when there are no known to the station agent acting for the purpose, of delivery, from carrier or freighthaul, as the agents of the consignor or consignee, and not as carriers. The Company will not be liable or responsible for any loss, damage or detention of such goods or property, except as to the connecting carriers or freight men for transportation.

13. No station agent or clerk has authority to alter or vary any of these Rules and Conditions.

All carload freight shall be subject to a minimum charge for trackage and rental of $10 per car, and no less charge shall be made for the use of the Company's track and rental of cars for carload freight, and after the expiration of 24 hours from the time notice of the arrival of such freight has been given to the consignee, or his agent, at the station where the same is to be delivered, the Company shall have a lien upon the freight in addition to its own freight charges and lack charges.

EXHIBIT A.

Form 181.

CHICAGO, MILWAUKEE & ST. PAUL RAILWAY CO.

ALL RAIL

THROUGH FAST FREIGHT LINE.

BONDED.

J. H. HILAND, General Freight Agent, Chicago.

No. ..... Dub 11/20 1894

Received from Carr P. & E. Co. Oct 24-94

...ject to all the conditions and regulations of the published tariff of said Company, to be transported over the line of this Railroad or ...

...delivered after payment of freight to ... road order to ... a company or carrier of the same are to be forwarded beyond the lines of the ... unless consent to be secured to the piece of ... it being expressly agreed that the responsibility of this Company shall cease at this Company's depot, at which the same are to be ... issued by this Company. But this Company guarantees that the rate of freight for the transportation of said packages shall not exceed rates noted in margin of this Bill of Lading, and charges ... to the following conditions: **Printed contents of packages are correctly stated in Railroad Receipts (original and duplicate,) on which this Bill of Lading is issued,**

This Company shall not be responsible for the loss of packages or contents of which are unknown, or for leakage of any kind of Liquids, breakage of any kind of Glass, Carboys of Acid ... Articles packed in Glass, Stoves or Stove Furniture, Castings, Machinery, Carriages, Furniture, Pianos, Looking-glasses, Marble, Stone, Packages of Glass or Glassware, Eggs, Hay, Hemp, ... or any article whose fresh condition is necessary to transport it, Iron cars, or Car Mileage on private property, or ... Chains, or any ... Cotton in bags, or Sacks or Bales, not for the ... Nails, Wheat, or Tobacco in Casks or Leaves, not covered by duly ... or for damage to or loss of property ... or for any loss of weights of Grain, or Coffee in bags, or

124 *Motion of Receiver to Amend Stipulation.*

In the Circuit Court of the United States in and for the Southern District of Illinois.

THE MERCANTILE TRUST COMPANY OF NEW York, Complainant,
vs.
CHICAGO, PEORIA & ST. LOUIS RAILROAD Company, Defendant.
} Consolidated Cause.

In the matter of the intervening petitions of the Carr, Ryder & Engler Company, Chicago, Milwaukee and St. Paul Railway Company, the S. Y. Hyde Elevator Company, the W. W. Cargill Company, Jacob Rau; James N. Gilchrist and Colin F. Bell, partners under the firm name of Gilchrist & Company; the Huntting Elevator Company, and Thomas McMichael and William McMichael, under the firm name of McMichael & Son, and Henry Rippe.

To Burton Hanson and George P. Carey, solicitors for defendants:

Please take notice that on Wednesday, the 15th day of January, 1896, we will present a motion, a copy of which is attached hereto, to his honor Judge Allen, in his court-room at 10 o'clock in the morning, or as soon thereafter as counsel can be heard, and ask that an order be entered thereon.

BLUFORD WILSON,
Solicitor for Receiver of the Chicago, Peoria & St. Louis Railway Company.

The above notice is hereby acknowledged this — day of January, 1896.

125 *Motion of Receiver to Amend Stipulation.*

In the Circuit Court of the United States in and for the Southern District of Illinois.

THE MERCANTILE TRUST COMPANY OF NEW York, Complainant,
vs.
CHICAGO, PEORIA AND ST. LOUIS RAILROAD Company, Defendant.
} Consolidated Cause.

In the matter of the intervening petitions of the Carr, Ryder & Engler Company, Chicago, Milwaukee and St. Paul Railway Company, the S. Y. Hyde Elevator Company, the W. W. Cargill Company, Jacob Rau; James N. Gilchrist and Colin F. Bell, partners under the firm name of Gilchrist & Company; the Huntting Elevator Company, and Thomas McMichael and William McMichael, under the firm name of McMichael & Son, and Henry Rippe.

Motion of Receiver.

Now comes C. H. Bosworth, receiver of the Chicago, Peoria and St. Louis Railway Company, by Bluford Wilson and P. B. Warren,

his solicitors, and moves the court for leave to amend a certain stipulation entered into in the above-entitled cause on the 27th day of August, 1895, by and between the solicitors of record of the respective parties, in the following particulars, to wit:

First. At page 2, beginning on the 6th line in paragraph 3, strike out the following: "that receipts, of which Exhibits B, C, D and E, attached to this stipulation are copies, were given by said railway company at the time said barley was received by it for transportation;" and beginning on the 11th line of said paragraph 3, on page 2, strike out "belonged to the petitioner, and."

Second. In paragraph 4, beginning on the 2d line of page 3, strike out "that receipts, the same in form as Exhibits B, C, D and E, attached to this stipulation, were given by said railway company at the time said barley was received by it for transportation;" and in the said paragraph 4, on the 7th line of said page 3, strike out "belonged to the petitioner, and."

Third. On page 3, beginning on the 6th line of paragraph 5, strike out "that receipts the same in form as Exhibits B, C, D and E, attached to this stipulation, were given him by said railway company at the time said barley was received for transportation;" and on said page 3, beginning on the 11th line of said paragraph 5, strike out "belonged to the petitioner, and."

Fourth. On said page 3, beginning in the 8th line of para-
126 graph 6, strike out "that receipts the same in form as Exhibits B, C, D and E, attached to this stipulation, were giv to them by said railway company at the time said barley was received for transportation;" and on page 4, beginning in the 4th line of said page, strike out "belonged to the petitioner, and."

Fifth. On page 4, beginning in the 6th line of paragraph 7, strike out "that receipts the same in form as Exhibits B, C, D and E, attached to this stipulation, were given to it by said railway company at the time said barley was received for transportation;" and on said page 4, beginning in the 12th line of said paragraph 7, strike out "belonged to the petitioner, and."

Sixth. On page 4, beginning in the 8th line of paragraph 8, strike out "that receipts the same in form as Exhibits B, C, D and E, attached to this stipulation, were given to them by said railway company at the time said barley was received for transportation;" and on page 5, in line 2 of said page, strike out "belonged to the petitioner, and."

Seventh. On page 5, beginning in the 8th line of paragraph 9, strike out "that receipts the same in form as Exhibits B, C, D and E, attached to this stipulation, were given him by said railway company;" and on page 5, beginning in the 15th line of said paragraph 9, strike out "belonged to said Rippe, and."

And for grounds of said motion, this receiver respectfully shows unto this court, that said stipulation was entered into for the purpose of saving the labor and expense of making proof thereof; that the same was prepared by the solicitor for the intervening petitioners, and was signed by your receiver's solicitor under a misap-

prehension of the true facts, as the same have since developed in the progress of this cause.

That this receiver had no means, at the time said stipulation was entered into, of knowing that the allegations of the facts herein sought to be stricken out were untrue, as the same were wholly and exclusively within the knowledge of the petitioners. That when said stipulation was presented to his solicitor as a statement of true facts, he accepted it as the same by reason thereof; that the knowledge that the same were untrue has come to him through the evidence of the intervenors themselves.

And petitioner files herewith and asks the same to be taken as a part hereof, an affidavit in support of the foregoing, and also to the further effect that this motion is not made with a view to vex or delay the said petitioners in the prosecution of their said claims; that the same is made to avoid wrong and injury to this petitioner.

C. H. BOSWORTH,
Receiver of the Chicago, Peoria & St. Louis Railway Company,
By BLUFORD WILSON &
P. B. WARREN,
Solicitors for Receiver.

127 *Affidavit in Support of Motion.*

In the Circuit Court of the United States for Southern District of Illinois.

MERCANTILE TRUST COMPANY OF NEW YORK
vs.
CHICAGO, PEORIA & ST. LOUIS RAILWAY COMPANY.

In the matter of the intervening petitions of the Carr, Ryder & Engler Company, Chicago, Milwaukee & St. Paul Railway Company, *et al.*

UNITED STATES OF AMERICA,
Southern District of Illinois, } *ss:*

Bluford Wilson, being duly sworn, on oath deposes and says that he is solicitor for C. H. Bosworth, receiver of the Chicago, Peoria & St. Louis Railway Company; that on the 27th day of August, 1895, for and in behalf of said C. H. Bosworth, he entered into a stipulation with Burton Hanson, as solicitor for the Chicago, Milwaukee & St. Paul Railway Company and various intervening petitioners; that when he entered into said stipulation he believed it to be what it purported to be, to wit: a statement of true facts; that inasmuch as said Burton Hanson requested him to sign the stipulation, he belived that the same was prepared by said Burton Hanson; that inasmuch as certain of the facts therein alleged were wholly within the knowledge of the clients of said Burton Hanson, this affiant at that time had no means of knowing that the same were untrue;

that the knowledge that the said facts were untrue has come to him through the evidence of the intervenors themselves; and this affiant further deposes and says that the motion of the receiver herein to amend said stipulation, by striking out the allegations of all the facts which have developed in the progress of the trial to be untrue, is not made with a view to vex or delay the said petitioners in the prosecution of their said claims, but that the same is made to avoid a wrong and injury to the said receiver.

BLUFORD WILSON.

Subscribed and sworn to before me this 13th day of January, 1896.

P. B. WARREN,
Notary Public.

128 *Order Amending Stipulation, Aug.* 27, 1895.

Order amending stipulation.

In the Circuit Court of the United States for Southern District of Illinois.

MERCANTILE TRUST COMPANY
vs.
CHICAGO, PEORIA & ST. LOUIS RAILWAY COMPANY.

In the matter of the intervening petition of the Chicago, Milwaukee & St. Paul Railway Company and others.

This cause coming on to be further heard upon the motion of the receiver in the above-entitled cause for leave to amend a certain stipulation entered into between the parties hereto on the 27th day of August, 1895, and the court having heard argument of counsel and being fully advised in the premises, upon consideration thereof, does hereby order, adjudge and decree, that the said motion of the receiver be and the same is hereby granted. And the said receiver is authorized to amend the said stipulation in the particulars set out in his said motion.

And it is further ordered by the court that the petitioners and the receiver be and they are hereby granted further time to introduce evidence in support and rebuttal of the allegations of facts stricken out of said stipulation by this order.

Petitioners' evidence to be closed on February 7th, 1896, and receiver's evidence to be closed on February 22d, 1896.

EXHIBIT "E."

Report of C., M. & St. P. R'y as to Cars Delivered.

Chicago, Peoria & St. Louis railway—C. H. Bosworth, receiver.

SPRINGFIELD, ILLS., 10, 28, 1894.

Report of C., M. & St. P. cars delivered to our connections—W. R. Bradley, car accountant.

L for loaded.
X for empty.

Car No.	Delivered to.	L or X.	Destination.
35454	Wiggins.		Ferry.
45996	Wiggins.		Ferry.
30700	Wiggins.		Ferry.
129 35364	Wiggins.		Ferry.
9676	Wiggins.		Ferry.
16562	Eads.		Bridge.
31872	Eads.		Bridge.
2100	Eads.		Bridge.

EXHIBIT "F."

Cars Damaged and Burnt by Fire at East St. Louis.

SPRINGFIELD, ILLS., *Nov.* 2, 1894.

Mr. W. E. Beacham, C. A., C., M. & St. P., Chicago, Ill.

DEAR SIR: In response to attached telegram please find statement showing C., M. & St. P. cars which were damaged by fire or burned at East St. Louis, October 26th.

Yours truly,

W. R. BRADLEY,
Car Accountant.

Enclosure # 3.

Telegram.

CHICAGO, ILLS., *Nov.* 1, 1894.

W. R. Bradley, J. S. E. line:

Have you received any report of the numbers of our cars destroyed by fire in East St. Louis recently.

W. E. BEACHAM.

EXHIBIT F.

Cars Damaged by Fire at East St. Louis Oct. 28, 1894.

C., M. & St. P. No. 44562.
" " 47654.
" " 46648.
" " 15254.
" " 5906.

M. & N. 178.
C., M. & St. P. 7286.
" " 17868.
" " 45964.
" " 31950.
" " 7552.
" " 4268.
" " 16802.
" " 36088.
" " 30290.
" " 43264.
" " 12.

130 *Cars Burned at East St. Louis Oct. 28th, 1894.*

M. & N. No. 1232.
C., M. & St. P. 10536.
" " 3218.
" " 34908.
" " 17272.
" " 16502.
" " 46064.
" " 43222.
" " 15944.
" " 32986.
" " (12).
" " 1100.
" " 31098.
" " 31204.
" " 46992.
" " 34574.
" " 2430.
" " 32194.
" " 33134.
" " 4126.
" " 37506.
" " 38108.
" " 12336.
" " 3728.
" " 18126.
" " 6842.
" " 10720.
" " 43080.
" " 20022.
" " 2598.
" " 6364.
" " 12886.
" " 33090.
" " 11836.
" " 680.
M. & N. 1154.
C., M. & St. P. 3524.

FORM 84. 11-96 10m.—Journal.

CHICAGO, PEORIA & ST. LOUIS R. R.

Springfield, Ill., 10/2 189 4

Report of M + N *Cars delivered to our connections.*

L for Loaded. X for Empty. W. R. BRADLEY, Car Accᵀ

Car No.	Delivered to	L or X	Destination.
896	Eads		Bridge
		X	

FORM 84. 11-96 10m.—Journal.

CHICAGO, PEORIA & ST. LOUIS R. R.

Springfield, Ill., 10/ 189 4

Report of C M + St P *Cars delivered to our connections.*

L for Loaded. X for Empty. W. R. BRADLEY, Car Accᵀ

Car No.	Delivered to	L or X	Destination.
18234	R I & P		P
47622	C R I & P		P
21366	Eads		Bridge.
34148	"		"
15748	"		"
48076	"		"
8486	St L, Wag		Aug 23
32402	"		"
38476	"		"
32320	"		"
46092	"		"
13372	"		"
7466	"		"
12892	"		"
31748	"		"
35214	"		"
10766	Wag		Ferry

FORM 84. 11-96 10m.—Journal.

CHICAGO, PEORIA & ST. LOUIS R. R.

Springfield, Ill., 10/ 189 4

Report of C M + St P *Cars delivered to our connections.*

L for Loaded. X for Empty. W. R. BRADLEY, Car Accᵀ

Car No.	Delivered to	L or X	Destination.
32674	Eads		Bridge
46582	"		"
21818	"		"
6660	Coup 12		Ref "
8296	"		" X

FORM 84. 11-96 10m.—Journal.

CHICAGO, PEORIA & ST. LOUIS R. R.

Springfield, Ill., 10/6 189 4

Report of C M + St P *Cars delivered to our connections.*

L for Loaded. X for Empty. W. R. BRADLEY, Car Accᵀ

Car No.	Delivered to	L or X	Destination.
42654	Eads		Bridge
42194	"		"
19904	"		"
1102	"		"
11764	"		"
17090	mo P W & B		C Road E & M
4118	"		"
35434	"		"
1304	"		" X

FORM 84. 11-96 10m.—Journal.

CHICAGO, PEORIA & ST. LOUIS R. R.

Springfield, Ill., 10/20 1894

Report of C M & St P *Cars delivered to our connections.*

L for Loaded. X for Empty. W. R. BRADLEY, Car Accᵗ

Car No.	Delivered to	L or X	Destination
12306	Wag.		Ferry
14584	573	"	"
11912	573	"	"
14702	Wag	" 573	"
36536	E 573	"	"
35714	573	"	"
45442	Eads		Bridge
15132	Rip Crip		573
19736	"	"	" X
46386	"	"	" X
3504	"	"	" X

FORM 84. 11-96 10m.—Journal.

CHICAGO, PEORIA & ST. LOUIS R. R.

Springfield, Ill., 10/13 1894

Report of C M & St P *Cars delivered to our connections.*

L for Loaded. X for Empty. W. R. BRADLEY, Car Accᵗ

Car No.	Delivered to	L or X	Destination
33194	Eads		Bridge X
3524	"	"	"
2948	"	"	"
32328	"	"	"
7022	"	"	"
15546	"	"	"

FORM 84. 11-96 10m.—Journal.

CHICAGO, PEORIA & ST. LOUIS R. R.

Springfield, Ill., 10/22 1894

Report of C M & St P *Cars delivered to our connections.*

L for Loaded. X for Empty. W. R. BRADLEY, Car Accᵗ

Car No.	Delivered to	L or X	Destination
14444	Wag		Ferry
43262	"	"	"
6318	C.B.I. UC		C & A Crip 573
39130	"	"	"
36938	Eads		Bridge
15370	"	"	" X
19052	"	"	"
18492	Merchants		Bridge

FORM 84. 11-96 10m.—Journal.

CHICAGO, PEORIA & ST. LOUIS R. R.

Springfield, Ill., 10/24 1894

Report of C M & St P *Cars delivered to our connections.*

L for Loaded. X for Empty. W. R. BRADLEY, Car Accᵗ

Car No.	Delivered to	L or X	Destination
44872	Wiggins		Ferry
3160	"		"
39272	"		"
38530	Eads		Bridge
13234	"		"
3050	"		"
35312	"		"
37546	"		"
1242	"		"
46698	Crip		C B M &
43816	"		"
19614	"		X
39570	"		"
19922	"		"
38276	a 1-07		J & L Wag
	Crip		573

FORM 84. 11-96-10m.—Journal.

CHICAGO, PEORIA & ST. LOUIS R. R.

Springfield, Ill., 10/10 189 4

Report of C M & St P Cars delivered to our connections.

L for Loaded. X for Empty. W. R. BRADLEY, Car Acc't

Car No.	Delivered to	L or X	Destination.
46720	C. J. & St		
14	Wag		Jerrey
40336	"		"
37202	"		"
15292	"		"
21640	"		"
34782	"		"
46216	"		"
34998	"		"
33508	"		"
35900	"		"
6754	"		"
20350	Eads		Bridge
14046	"		"
9634	"		"
21676	"		" X

FORM 84. 11-96-10m.—Journal.

CHICAGO, PEORIA & ST. LOUIS R. R.

Springfield, Ill., 10/9 1894

Report of C M & St P Cars delivered to our connections.

L for Loaded. X for Empty. W. R. BRADLEY, Car Acc't

Car No.	Delivered to	L or X	Destination.
11622	Wag		Jerrey
19978	Brmgs		Pkg 273
14996	"		"
12274	"		"
7686	"		"
19664	"		"
7218	"		"
5324	"		"
31026	"		"
30932	"		"
31054	"		"
14391	Eads		Bridge X
7160	"		"
13344	"		"

FORM 84. 11-96-10m.—Journal.

CHICAGO, PEORIA & ST. LOUIS R. R.

Springfield, Ill., 10/17 1894

Report of C M & St P Cars delivered to our connections.

L for Loaded. X for Empty. W. R. BRADLEY, Car Acc't

Car No.	Delivered to	L or X	Destination.
20656	Eads		Bridge
35286	"		"
10508	"		"
40446	"		"
13762	"		" X
8968	"		"
2406	"		"
44084	"		"
4030	"		"
8992	Wag		Jerrey
21398	"		"
16962	"		"
3882	"		"

FORM 84. 11-96-10m.—Journal.

CHICAGO, PEORIA & ST. LOUIS R. R.

Springfield, Ill., 10/10 1894

Report of C M & St P Cars delivered to our connections.

L for Loaded. X for Empty. W. R. BRADLEY, Car Acc't

Car No.	Delivered to	L or X	Destination.
7302	Eads		Bridge X
36444	"		" X
670	"		" X
11502	Wag		Jerrey
13164	"		"

FORM 84. 11-96 10m.—Journal.

CHICAGO, PEORIA & ST. LOUIS R. R.

Springfield, Ill., 189 .

Report of . *Cars delivered to our connections.*

L for Loaded. X for Empty. W. R. BRADLEY, Can Acc't.

Car No.	Delivered to	L or E	Destination.
5702	Eads		Bridge
12042			"
1686	~~Pm + Rck Isl~~		~~" "~~
4950	"		"
8702	"		"
6358	"		"
9920	"		"
43348	"		X
18816	"		"
1938	"		"
12986	"		"
35588	"		"
9468	"		"

FORM 84. 11-96 10m.—Journal.

CHICAGO, PEORIA & ST. LOUIS R. R.

Springfield, Ill., 10/24 189 4

Report of Cm rct 9 *Cars delivered to our connections.*

L for Loaded. X for Empty. W. R. BRADLEY, Can Acc't.

Car No.	Delivered to	L or E	Destination.
48250	Merchants		Bridge
13672	Wig		Ferry
35556	"		"
21216	"		"
6156	"		"
15704	"		"
14400	"		"
38948	"		"
33484	"		"
35522	73 Crp		Rip
38236	"		"
28816	Eads		Bridge
43262	Crp		Rip X
14998			

Sms
Eads B 73

FORM 84. 11-96 10m.—Journal.

CHICAGO, PEORIA & ST. LOUIS R. R.

Springfield, Ill., 10/23 189 4

Report of Cm rct 9 . *Cars delivered to our connections.*

L for Loaded. X for Empty. W. R. BRADLEY, Can Acc't.

Car No.	Delivered to	L or E	Destination.
48224	Eads		Bridge
13924	Rip + Crp		X
8936	"		" X
39340	"		"
31414	"		"
36532	Wig		Ferry
44368	"		"
36700	"		"

135 EXHIBIT "H."

Letter of W. H. Hemphill to J. N. Barr.

JACKSONVILLE, ILLS., *Nov.* 15, 1894.

Mr. J. N. Barr, sup't M. P., C., M. & St. P. R'y, West Milwaukee.

DEAR SIR: Attached please find list of C., M. & St. P. cars destroyed in fire at East St. Louis, October 28th. Will you please send me a memorandum giving the age, dimensions and value of the cars according to M. C. B. rules. I desire the value of the body and truck separately, as we may decide to rebuild trucks and return them to you. Also would like to have the weight of wrought iron and cast iron separately in the body of the car, also in the trucks, exclusive of wheels and axles. This information will save us a great deal of work in getting the amount of salvage. Will advise later concerning bill.

Yours truly,

W. J. HEMPHILL,
Sup't M. P. & M.

EXHIBIT "I."

List of Cars Destroyed in E. St. Louis.

C., M. & St. P. cars destroyed in fire at East St. Louis.

Milwaukee & Northern		1232
Milwaukee & Northern		1154
C., M. & St. P.		46064
	"	43222
Union Line.		10071
C., M. & St. P.		10536
	"	3218
	"	34908
	"	17272
	"	16502
	"	15944
	"	32986
	"	12
	"	1100
	"	31098
	"	31204
	"	46992
	"	34574
	"	2430
	"	32194
	"	33134
	"	4129
136 C., M. & St. P.		37506
	"	38108

C., M. & St. P.	12336
"	3728
"	18126
"	6842
"	10720
"	43080
"	20022
"	2598
"	6364
"	12886
"	33090
"	11836
"	680
"	3524

EXHIBIT "K."

Letter of J. N. Barr to W. J. Hemphill.

WEST MILWAUKEE, *November* 19, 1894.

W. J. Hemphill, Esq., S. M. P. & M., J. S. E. line, Jacksonville, Ill.

DEAR SIR: I have your favor of the 15th in response to mine of November 7th, regarding 38 cars destroyed in fire at East St. Louis October 28th. I send you herewith statement showing the capacity, date built, and age of each car, with depreciated value for body and trucks, also car complete. Will you please advise me at your earliest convenience whether we shall render bill for both body and trucks of these cars. I am anxious to dispose of the matter promptly, and wish you would favor me with an early reply. At the same time advise what disposition will be made of the cars shown as damaged on the list sent you November 7th.

As requested I enclose statement showing amount of cast and wrought iron, springs and brasses, body and trucks separate, for our 28, 30, 40 and 60 thousand pound capacity cars.

Yours truly,

J. N. BARR,
Sup't Motive Power.

Copy.

137 *Statement of Cars Destroyed on J. S. Line in Fire at E. St. Louis Oct.* 28, 1894.

Statement of cars destroyed on Jacksonville Southeastern line in fire at East St. Louis October 28, 1894.

Numb'r.	L'gth.	Cap'y.	Built.	Age.	Depreciated.		Value cars.	Remarks.
					Body.	Trucks.		
12.....	28'	30,000	Aug., '71	.....	80.00	96.00	176.00	
680.....	28'	30,000	.....	Aug., '71	80.00	96.00	176.00	
1100.....	25'	30,000	.....	Aug., '71	80.00	96.00	176.00	
2431.....	28'	28,000	Aug., '79	15-2	80.00	96.00	176.00	
2598.....	28'	30,000	.....	Aug., '71	80.00	96.00	176.00	
3218.....	28'	28,000	.....	Aug., '79	80.00	96.00	176.00	
3524.....	28'	30,000	.....	Aug., '71	80.00	96.00	176.00	
3728.....	28'	30,000	.....	Aug., '71	80.00	96.00	176.00	
4126.....	28'	28,000	.....	Aug., '71	80.00	96.00	176.00	
6364.....	28'	30,000	Oct., '77	17-	80.00	96.00	176.00	
6842.....	28'	30,000	Sept., '79	15-1	80.00	96.00	176.00	
16536.....	28'	28,000	May, '80	14-5	82.00	98.40	180.40	
10720.....	28'	28,000	May, '80	14-5	82.00	98 40	180.40	
11836.....	28'	30,000	Sept., '80	14-1	83.68	100.42	184 10	
12336.....	28'	28,000	7, '80	14-3	82.84	99.41	182.25	
12886.....	28'	30,000	Oct., '80	14-	84.10	100.93	185.03	
15044.....	33'	40,000	Nov., '80	13-11	84.55	101.46	186 01	
16502.....	28'	30,000	Nov., '80	13-11	84 55	101.46	186.01	
17272.....	33'	40,000	June, '81	13-4	87.68	120.58	208.26	
18126.....	33'	40,000	June, '81	13-4	87.68	120.58	208 26	
24022.....	33'	40,000	Apr., '81	13-6	86 79	159.34	246.13	Air brake.
31098.....	33'	40,000	Aug., '83	11-2	100.25	137.85	238.10	
31201.....	33'	40,000	Sept., '83	11-1	100.75	178.55	279.30	Air brake.
32194.....	33'	40,000	Oct., '83	11-	101 26	139.24	240.50	
32986.....	33'	40,000	Oct., '83	11-	101.26	137.24	240.50	
33090.....	33'	40,000	Mar., '86	8-7	117 64	161.78	279.42	
33134.....	33'	40,000	Mar., '86	8-7	117.64	161.78	279.42	
34574.....	33'	40,000	Apr., '86	8-6	118.25	162.61	280 86	
34908.....	33'	40,000	May, '86	8-5	118.86	163.45	282.31	
37506.....	33'	40,000	Mar., '88	6-7	133.14	183 08	316.22	
38104.....	33'	40,000	7, '28	12-3	93 75	168.93	262.68	Air brake.
43 80.....	33'	60,000	Oct., '90	4-	156.15	274.22	430 37	Air brakes.
43222.....	33'	60,0 0	Oct., '90	4-	156.15	274 32	430.27	Air brakes.
46092.....	33'	60,000	7, '91	3-3	163.63	285 43	449 06	Air brakes.
1154.....	34'	50,000	Oct., '88	6-	137.97	206.97	344.94	(Lettered M. & N.)
1232.....	34'	50,000	Oct., '88	6-	137.97	206 97	344.94	" " "
10071.....	28'	28,000	Mar., '80	14-7	81.15	97.40	178.55	
46064.....	33'	60,000	Dec., '90	3-11	157.81	276.72	434.53	Air brake.

138 On Tuesday, September 3, 1895, beginning at 10 o'clock a. m., before Stuart Brown, master in chancery of the United States court for the southern district of Illinois, in the case of The Mercantile Trust Company and others against The Chicago, Peoria and St. Louis railway and others, a consolidated cause in said court pending, and in the matter of the interventions in said cause by the Chicago, Milwaukee and St. Paul railway and others, parties reappeared, the intervenors represented by Burton Hanson and George P. Cary, and the receiver by Bluford Wilson and Philip Barton Warren; when the following further testimony on behalf of intervenors was taken, signatures waived, Volney Hickox acting as stenographer.

Mr. WILSON: I wish the record of appearance to be taken.

Mr. HANSON: On the part of the petitioners or intervenors George P. Cary and Burton Hanson.

Mr. WILSON: On the part of the receiver Bluford Wilson and Philip Barton Warren.

Mr. HANSON: I wish to recall Mr. Beacham.

Mr. WILSON: Now, may it please your honor, I desire to object to the further proceedings in this cause at this time and to add to

the specific objections which I may from time to time offer to the testimony on behalf of petitioners on the hearing the general objections.

1st. That the issues in this cause have not been properly joined.

2d. That the necessary parties who are of record in the original cause have not been made parties to this hearing and have not been formally notified of these proceedings; namely, the St. Louis Terminal Association; and in support of the objection I invite the attention of your honor to the fact that the record of the cause shows that the St. Louis Railroad Terminal Association is a party already in the original foreclosure proceedings, and that a rule has been served upon it to show cause why it should not be joined as a party defendant in these proceedings, and that rule which has been served upon the St. Louis Terminal Association has not yet been disposed of; in further support of the objection, I call the attention of the master to the cross-petition filed on behalf of the receiver, a petition for a rule to show cause and to the rule in the record served upon the St. Louis Terminal Association. And I now move to postpone further proceedings in this matter.

The MASTER: When was your cross-petition filed?

Mr. WARREN: On the thirteenth of May, 1895.

Mr. WILSON: And the order of the court issued thereon on the fourth of June, 1895.

139 The MASTER: The motion is overruled.

Mr. WARREN: We except to the master's ruling.

Mr. HANSON: I wish to ask leave to file a replication to the receiver's answer.

The MASTER: I don't think I ought to pass on the pleadings; that will have to go to the court.

Mr. HANSON: In reply to Mr. Wilson I will state that this hearing is under a stipulation that the hearing should go on; I wish to make proof of that and will ask Major Wilson to be sworn; I don't want this to go into the record as if there were no notice; I have a telegram from Major Wilson on the subject. I will ask it to be noted, however, first, that petitioners ask leave to make and file their replication to the receiver's answer, and since the master refers the matter to the court, the attorneys for the receiver are now notified that leave will be asked from the court to file a replication as of the proper term, if such replication be necessary.

Mr. WILSON: As to the stipulation it is right; I should call the attention of your honor to the fact that Mr. Warren in giving his consent had in mind only the appearance of the receiver, in the matter, and did not undertake either directly or indirectly in any way to consent to the waiving of notice to necessary parties in this cause. It is not our appearance that we are questioning, but we are objecting to the further conduct of these proceedings, in view of the fact that the record does not show any notice to the St. Louis Railroad Terminal Association or any appearance for them; I will add to the record that upon the former hearing I observed the presence of Mr. Watts, the general counsel for the St. Louis Terminal Railroad Association, and also the presence of Mr. Samuel P.

Wheeler of this city, who was, as I understood, at the time in the same interest. The parties are not present at this meeting. And I did what I could then by challenging the record to call the attention of the court to the fact that the St. Louis Railroad Terminal Association should be fully identified and become responsible, so far as the presence of counsel could make them responsible, as to the further order of the proceedings. That the record shows.

The MASTER: I don't understand that you made any mention of Mr. Wheeler.

Mr. WILSON: I thought I did; I observed him.

Mr. HANSON: I understand Mr. Wheeler represents other intervenors and was simply present as other people who were sitting around the room.

The MASTER: I have overruled the motion, and I think the proceedings should go on.

Mr. WILSON: I desire to add this further statement in reply
140 to the suggestions of Mr. Hanson, the opposing counsel. The consent now of record by the receiver was, of course, upon the theory that all necessary parties should be present, and that the proceedings would be conducted in the orderly method of such proceedings, on due notice to the necessary parties, and especially parties of record, and subject to all objections whatever that the receiver might be able to fairly make to the regularity.

Mr. HANSON: I wish myself to be sworn, if there is going to be any objection.

Mr. WILSON: The same objection, of course, goes to Mr. Hanson's statement as to any other of the proceedings.

Testimony of Mr. Hanson.

Mr. HANSON, sworn:

About a week before the 27th day of August, I wired Major Wilson, asking him to fix a time for taking testimony in these proceedings; he wired back, fixing Tuesday, August 27th, as the day for taking the testimony. I replied, I would be ready to go on with the testimony that day, and accordingly, I got here on Tuesday, the 27th of August, and proceedings were had as shown by the master's report, to be continued today.

Cross-examination by Mr. WILSON:

Q. I will ask you to look at this letter and state whether that is your signature, and whether you wrote that letter or not (exhibiting).

A. Yes, sir.

Q. I desire to offer the letter of Mr. Hanson in connection with his testimony (letter marked Exhibit One).

(Objection by Mr. Hanson to the letter as having no relevancy whatever to this testimony.)

Q. Did you write that, also (exhibiting another paper)?
A. Yes, sir.
Q. I offer that, also.

(Objection by Mr. Hanson, on the same ground, that neither letter has any relevancy to the stipulation made for the conduct of this testimony.)
(Marked Exhibit Two.)
The MASTER: They are admitted subject to objection.
(Exception to their admission by counsel for intervenors.)
Mr. HANSON: I now ask that Mr. Beacham be recalled.

141 *Testimony of W. E. Beacham.*

Mr. BEACHAM recalled.

Direct by Mr. HANSON:

Q. Are you familiar with the custom among different railroads in the United States as to exchanging cars between the different companies in the transportation of freight and the return of those cars to the company owning them?
A. Yes, sir.
Q. You may state what the custom is in reference to the exchange of cars, receiving the cars of one company by another, when consigned to points off the line, and the return of those cars when taken to their destination and unloaded.
A. The practice is to return them through the channel whence they came.
Q. Give an illustration; take any shipment, in this case, for instance, from La Crosse to St. Louis by way of East St. Louis.
A. You may take, if you please, a car loaded at La Crosse, Wisconsin, belonging to the Chicago, Milwaukee and St. Paul railway, billed to St. Louis——
Q. By way of East St. Louis?
A. By way of East St. Louis. It would be taken by us and delivered to the Rock Island and Peoria railroad at Rock Island; they would take it to Peoria, and would deliver it through the Peoria and Pekin Union railroad, which is a switching association, to the Chicago, Peoria and St. Louis railway, and they in turn would deliver it to the St. Louis Railroad Terminal Association, to reach its final destination at St. Louis. After the car was made empty it would in the ordinary course of business be returned through the same channel to us.
Q. So the Terminal Association would return it to the Chicago, Peoria and St. Louis, and they would return it through its connection back to the St. Paul Company?
A. Yes, sir.
Q. Take these shipments in question, transporting barley from points in Iowa, Wisconsin and so forth, by the way of East St. Louis to St. Louis, consigned by way of East St. Louis; would that go through in the same car, if loaded at any of those points?
A. Yes, sir.

Q. That is, there would not be an unloading of the barley?
A. No, sir, no transfer.
Q. The barley would go through in the same car to its destination?
A. Yes, sir.
142 Q. That was the practice and custom?
A. Yes, sir.
Q. Are you acquainted with the practice and custom which prevailed among the different railroads of the United States in respect to the settlement or payment for cars damaged or destroyed when in possession of companies not owning the cars?
A. Yes, sir.
Q. You may state what the practice or custom is.
A. The practice is for the company, through its master car-builder, for the company on whose track the car is destroyed, to report such destruction to the owner of the car and to call for a history of the car, showing when it was built, and then they deduct a depreciation and salvage and settle direct with the owners of the car, if they so elect. But they may — it is optional with them to rebuild the car.
Q. So the company in whose possession the foreign car is, in case that car is damaged or destroyed, either rebuild the car or pay the company owning it?
A. That is the universal practice.
Q. Is that the way all settlements are made between different companies with respect to damaged and destroyed cars?
A. Yes, sir; it is.
Q. So that a car of the Chicago, Milwaukee and St. Paul Railroad Company, while in the possession of the Chicago, Peoria and St. Louis Railway Company, if damaged or destroyed, the latter company would pay the St. Paul Company for it, or rebuild the car?
A. Yes, sir.
Q. You say that is the custom and practice on which all settlements are made between different companies?
A. Uniform practice and custom.
Q. Take these cars in question which were consigned from points in Iowa, Minnesota and Wisconsin to St. Louis by way of East St. Louis, over the Chicago, Peoria and St. Louis railway, what would the Chicago, Peoria and St. Louis Company have in its possession showing that those cars were consigned to be delivered at St. Louis?
A. They would have a regular waybill which would follow the car through, made at the point of shipment.

Mr. WILSON: I am afraid you will find some difficulty in finding more than one of these cars billed to St. Louis.

Q. I will call your attention to the S. Y. Hyde Elevator Company; it appears that he has a receipt given by the Chicago, Milwaukee and St. Paul railroad to the S. Y. Hyde Elevator Company under date of September 9, 1894, for C., M. & St. P. car
143 No. 680. That is consigned to the Teichman Commission Company, St. Louis, Missouri, by way of East St. Louis. What do you call that paper I have shown you?

A. That is a receipt from our company to the shipper.
Q. Receipt or bill of lading?
A. Yes, sir.
Q. Now, that is a receipt given to the owner of the consignment, isn't it?
A. Yes, sir.
Q. Now, upon that bill of lading there is a waybill?

Mr. WILSON: I suppose you propose to put that in evidence?

Q. Yes, sir; upon that there is a waybill, made out by the St. Paul Company, is there, to accompany that car?
A. Yes, sir.
Q. I will now show you another paper, which is in red ink, called waybill of freight forwarded, and so forth? What do you call that?
A. Call that the regular waybill.
Q. Made out by the Chicago, Milwaukee and St. Paul Company?
A. At Wykoff, Minnesota.
Q. To accompany this car of barley?
A. Yes, sir.
Q. Did that go into the possession of the Chicago, Peoria and St. Louis railway?
A. I assume it did.
Q. Now, I offer this waybill and this receipt or bill of lading in evidence. (Marked Exhibit "L.")
Q. I want also to offer papers on the other cars. Those yellow papers are our waybills, are they?
A. Yes, sir.
Q. Accompanying the other cars?
A. Yes, sir.
Q. I understand all these go into evidence under the stipulation?

Mr. WILSON: I shall put them in evidence at the proper time if you don't.
Mr. WARREN: They were to go in under the stipulation.
(Marked successively "M" to "S.")

Q. Now, take this car, six eighty, which you have just testified about, in respect to both bill of lading and waybill; when that car reached East St. Louis to be sent over, what would be done by the C., P. & St. L. at that point, with reference to any further waybill, in the regular course of business?
A. My understanding of it would be they retained the original waybill and issued another.

144 (Objection.—To understanding.)

Q. If you don't know, I will withdraw the question and answer. I can prove it by another witness.
Mr. WARREN: Which car was that he testified about?
Q. Car sixty-eight, from Wykoff.

Cross-examination by Mr. WILSON:

Q. Taking this car, number sixty-eight, about which you have been questioned, I will ask you upon which of these papers the C., P. & St. L., or the Jacksonville and Southeastern railway, would handle the car at East St. Louis or at the destination?

A. Car six eighty would be handled upon this paper, which is a waybill.

Q. Now I will ask you to look at that waybill and name the point of delivery and the destination; the point of receipt and destination of that car, reading from the waybill itself?

A. This is a waybill reading from Wykoff, Minnesota, to East St. Louis.

Q. Then this is the paper, is it, upon which the Chicago, Peoria and St. Louis would handle the car?

A. Yes, sir.

Redirect by Mr. HANSON:

Q. Also in this paper, under the head of consignee, is Teichman & Co., St. Louis, Missouri?

A. Yes, sir.

Q. Is it upon this information the Chicago, Peoria and St. Louis would rewaybill that car at its destination?

A. Yes, sir.

Mr. WILSON: If you know?

Cross-examination by Mr. WILSON:

Q. Did you ever work around East St. Louis?

A. No, sir.

Q. Ever handle any cars there?

A. No, sir.

Q. Did you have any direct personal contact with the method of handling cars billed as in this waybill from a certain point north to East St. Louis?

A. Not any direct contact.

Q. You said something about the transfer of these cars through Peoria; what company makes the transfer through Peoria?

145 A. The Peoria and Pekin Union.

Q. Do you know what relation that company holds to the Chicago, Peoria and St. Louis, the P., D. & E., and other railroads terminating in Peoria or at Pekin?

A. They are tenant lines of that railroad.

Q. Do you know who owns the Peoria and Pekin Union railway?

A. No, sir.

Q. Do you know whether it is owned by a lot of the companies that use it in Peoria in common?

A. No, sir; I don't.

Q. Suppose these cars had been lost while on the tracks of the Peoria and Pekin railroad, who would have been responsible?

A. I should say the Peoria and Pekin Union railroad would be.

Testimony of George W. Phelps.

Mr. PHELPS recalled.

Direct by Mr. HANSON:

Q. Are you familiar——

Mr. WILSON: All and further taking of this testimony is under the objection I have made.

Q. Are you familiar with the custom prevailing between the different railroads of the United States, with reference to the exchange and return of freight cars?

A. Yes, sir.

Q. You may state what that custom and practice is—what it was at East St. Louis.

A. The custom is to return empty cars to the line receiving them.

Q. Give an illustration—cars in this controversy to St. Louis by way of East St. Louis.

A. Cars delivered to us for St. Louis delivery, we would deliver them at the places instructed by the way-bill, and on the car being made empty, return them to East St. Louis, to the line upon which they came.

Q. If you received them from the C., P. & St. L., you returned them to that line?

A. Yes, sir.

Q. What further would be done with them?

A. They would return the car, loaded or empty, to the line from whom they received it.

Q. Until the car got back home?

A. Yes, sir.

146 Q. Take this car testified to by Mr. Beacham, C., M. & St. P., car 680; it seems there was a bill of lading given at Wykoff station, Minnesota, and also a waybill made out for the car; now what information would the *the* C., P. & St. L. have at East St. Louis of the consignee or destination of that car?

A. The destination would be shown by the waybill, and the consignee would be the bill of lading that would show.

Q. What is there on that waybill which shows consignee and destination?

A. Body of the waybill—under the column consignee and destination shows Teichman Commission Company of St. Louis.

Q. Would this waybill come into possession of the Chicago, Peoria and St. Louis agent at East St. Louis?

A. That is a copy; original waybill accompanies the car and undoubtedly came into his possession.

Q. There would be a copy, then?

A. That is undoubtedly a copy.

Q. That would be in the possession of the agent of the C., P. & St. L.?

A. Yes, sir; in the regular course of business.

Q. With the waybill what would the agent do with reference to sending the car on—when it was sent on what would he make out?

A. He would rewaybill it to us.

Q. Have you a blank waybill such as he would issue in sending that car to Teichman in St. Louis?

A. Yes, sir; I have a blank railroad Terminal Association form.

Q. Will you produce one of those forms? (Marked Exhibit "T.") This blank form which the reporter has just marked—are those blanks marked as shown?

A. Yes, sir; we furnish all the connecting lines a supply of those blank forms.

Q. When this car, six eighty, reached East St. Louis and got ready to be sent over, what would the agent of the C., P. & St. L. at East St. Louis do in respect to the form?

A. Fill in that form, showing the necessary information in regard to properly forwarding the car.

Q. Then what would he do?

A. Deliver that waybill to us.

Q. Then what would you do with the car?

A. Forward the car as instructed in the waybill.

Q. Had any of these waybills been delivered to you in respect to any of the cars in controversy prior to or at the time of the fire?

147 A. No, sir.

Q. Fill that out so as to cover this car sixty-eight, as it would be filled out and delivered by the agent to you—I mean by the agent or any clerk of his.

Mr. WILSON: Practically an object-lesson you are giving us.

Q. Yes, sir.

(Objection.)

Q. (The form having been filled out by the witness as directed.) I now offer this in evidence as being in the same form as offered before, but filled up. (To witness:) Now, have you a waybill which has been made out by the C., P. & St. L. at East St. Louis of a car actually received and sent to the destination, Teichman, at St. Louis?

Mr. WILSON: Does the question pertain to any of these cars in controversy?

Q. No, sir.

(Objection.)

The MASTER: I can't say whether it is admissible or not; I will receive it under objection.

(Paper marked Exhibit "U.")

Q. I now offer another waybill similar to that, which can be marked. (Exhibit "V.")

(Objection.—Same objection.)

Q. I will call attention to the figures fifty-two ten; what is that?

A. Charges due the line which has transported the car to East St. Louis.

Q. That is, the charges from the starting point to East St. Louis or St. Louis?

A. In that case to St. Louis.

Q. Now, under that I see you have figures in blue lead-pencil, four fifty-nine, under the head of transfer; what does that indicate?

A. That is the transfer charges for taking the car from East St. Louis to the delivery point at St. Louis.

Q. Who paid those?

A. In that case the C., P. & St. L.

Q. The C., P. & St. L. paid the four fifty-nine?

A. Yes, sir.

Q. You would collect the fifty-two ten there as advance charges?

A. Yes, sir.

Q. Do you understand why the C., P. & St. L. paid your charges for taking that car from East St. Louis to St. Louis? State, if you know.

148 Mr. WILSON: He knows.

A. The freight was from competitive territory, and to equalize the rates competing lines are forced to pay the bridge charge.

Q. That is, if a line of road competed in this territory from which lines entered St. Louis on the west side of the river it paid the charges over to St. Louis?

A. Yes, sir.

Q. The C., P. & St. L., to compete for this freight to be carried over its line, agreed to take care of the bridge charges from East St. Louis to St. Louis?

A. That is the custom.

Cross-examination by Mr. WILSON:

Q. Referring to this car, six eighty, again, and to the waybill, at what point did the Terminal Company take possession of that car?

A. I don't know that we took possession of it at all; don't say we did.

Q. Well, in any of these bills you have introduced, at what point would the Terminal Company take possession of the cars?

A. At East St. Louis.

Q. Whereabouts?

A. On the tracks assigned in the terminal yard to the C., P. & St. L.

Q. You have given us an object-lesson here in the shape of a separate waybill on a form of the Terminal Railroad Association. I will ask you, assuming that car six eighty had been destined for actual delivery in St. Louis, where the Railroad Terminal Association would have taken it in possession?

A. At East St. Louis.

Q. Whereabouts?

A. On the tracks assigned to the receiver of the C., P. & St. L. tracks, shown on the blue print in evidence, marked red.

Q. From whose possession?

A. The C., P. & St. L. or the receiver.

Q. Do you wish to state with reference to that car and the other cars about which you have been examined, and for which you have

said you received no separate waybill, whether those cars were destined to St. Louis?

A. Knew nothing of the destination at all; never received any waybill, and knew nothing of the contents or destination.

Q. I will ask you whether in point of fact there are not many cars waybilled precisely as car six eighty was that never go to St. Louis at all?

149 A. Never go there?

Q. Yes, sir; that are unloaded at East St. Louis or disposed of in some other manner at the option of the consignee?

A. That might be.

Q. I will ask you whether it is a fact?

A. I can't say.

Q. What is your best impression?

A. I don't know, to tell the truth; know nothing about the way these local offices handle their business; when we get the waybill of a car we know what to do.

Q. I will ask you if all the cars the C., P. & St. L. bring into the "Y" tracks of the Terminal Association at St. Louis billed as those were billed——

Mr. HANSEN: What?

Q. Six eighty and the other cars of the C., M. & St. P. go in point of fact to St. Louis?

A. Don't go unless billed to St. Louis.

Q. Then do you mean that the cars billed as six eighty was from Wykoff to East St. Louis, and down below marked to Teichman go to St. Louis?

A. No; there are cases where the consignees gave instructions to send them to other points.

Q. Then the waybill you referred to covering six eighty is not at all conclusive on the question as to whether the car is to go to St. Louis or not?

A. It is until we get later orders from the consignee.

Q. It goes, unless the consignee tells it to go somewhere else?

A. Man that produces the bill instructs us to send it somewhere else; we do.

Q. You recognize the final disposition of the car as depending on the will of the consignee at East St. Louis or St. Louis?

A. Not altogether.

Q. To what extent?

A. That is rather a difficult question to answer.

Q. Well, answer it the best you can; to what extent are the cars that are billed, as car six eighty was, controlled as to their destination by the waybill, in every case or in some cases?

A. In probably ninety-nine out of a hundred the cars would go as billed; the other one would be sent where the consignee desired, paying the delivery charges.

Q. Then, you say, in ninety-nine cases out of a hundred the waybill would be conclusive as to the destination?

A. It is conclusive when given to us, in all cases; if the car is

stopped by the consignee after the delivery of the waybill, that is another case.

150 Q. Don't you know, if these cars had not been burned, a large number of them would never have gone to St. Louis in the course of business?

A. Might and might not.

Q. I will ask you to look at this object-lesson of yours, this form, and tell the master whether Teichman and Company indicated any particular point at St. Louis where the car should be transported?

A. In this particular case, no.

Q. How would you be directed, then, as to the ultimate destination of this car on this form you have filled out?

A. It is not billed that way, as a rule.

Q. I understood that you were giving us an object-lesson.

Mr. HANSON: Add to that.

(Witness takes the bill and writes an addition to the filling up.)

Q. What addition have you made?

A. Sixteenth street, Union depot; that would indicate.

Q. As you made it out originally, and seemed to be perfectly satisfied, it didn't indicate any particular point at which the car was to be delivered?

A. No, sir.

Q. Now, I will ask you if that addition to this waybill, or form, which you have made did not show conclusively that the original waybill to the C., P. & St. L., covering six eighty, did not show and did not pretend to show what particular point of delivery was intended by the shipper?

A. I couldn't say what the original waybill showed; it was not in our possession.

Q. You had a copy of it; why couldn't you speak from it?

A. This one? That simply shows St. Louis mark of its destination

Mr. HANSON: From which you made it out?

A. Yes, sir.

Q. I will ask you whether, in point of fact, that waybill does not, also, show the initial point at Wykoff, Minnesota, and terminal point at East St. Louis?

A. The waybill is headed East St. Louis, yes, sir.

Q. What is that for; what does it mean?

A. That waybill?

Q. Yes, sir.

A. Instruction to carry the car to East St. Louis over those lines.

151 Redirect by Mr. HANSON:

Q. When it arrived at East St. Louis what further was done?

A. We would not know anything about it until we got a waybill from the C., P. & St. L.

Q. And you got no such waybill in this case?

A. No, sir.

Q. Nor for any of those cars?
A. No, sir.
Q. Now, you say that if a car should be delivered to the Terminal Association by the receiver, with a waybill accompanying it, you would carry that car according to the waybill, unless the consignee with the special bill of lading demanded otherwise?
A. Yes, sir.
Q. Wouldn't act unless by order of the consignee, accompanied by the original bill of lading?
A. Yes, sir.
Q. The fact that he had the original bill was evidence that it was his property?
A. Yes, sir.
Q. What day of the week was this fire?
A. Sunday night.
Q. October 28th was Sunday?
A. Yes, sir.

Mr. HANSON: I would like to have that affidavit for proof of loss made by Mr. Calvert; I have given notice to produce it.

Mr. WILSON: I decline to produce it.

Mr. HANSON: Then I now offer in evidence a copy of the same, with the exception of the signature of Mr. Calvert and the date of his signature, which was, I understand, the twenty-second of December, 1894.

(Objection to the offer of the copy.)

Mr. WILSON: And I have declined to produce the original, first, because I haven't it in my possession at this time; and second, because I have had no written notice as to the particular paper desired by Mr. Hanson; no sufficient notice.

Mr. HANSON: I will pin the notice which I have given to the paper.

Mr. WILSON: You give it here today, do you?

Mr. HANSON: Yes, sir; I notified you I would give it; notice to the effect, requiring them to produce it, and if they decline, a copy of the original should be given. I now offer a copy of that paper as furnished to me by the receiver.

Mr. WILSON: Your honor observes it is a notice served upon me this morning for the first time.

152 The MASTER: I think I will admit the copy under your objections. (Paper marked Exhibit "W.")

Mr. HANSON: I wish to state that the original bears the signature of Mr. Calvert, and is sworn to before an officer authorized to administer oaths; and I now offer that in evidence.

(Objection.)

Testimony of A. M. Gregory.

Mr. GREGORY recalled.

Direct by Mr. HANSON:

Q. Was the original of this affidavit and statement attached to it, as made by Mr. Calvert presented to the insurance company?

A. It was; I would add to that that this was presented to the insurance companies under their clause allowing sixty days for notice of claims against them.

Q. Presented by the C., P. & St. L. Railroad Company or its receiver?

A. I was instructed by the general counsel to present it.

Q. The general counsel of the receiver?

A. Yes, sir; the claim was rejected by the insurance companies.

Q. I think that is our case.

Mr. WILSON: I want this notice pinned to that paper with the note that it was served on me here.

Mr. HANSON: I find some of the waybills and bills of lading on some of the cars are not here. With that exception I close my case.

Mr. WILSON: Please designate what cars.

Mr. HANSON: I don't think I can.

Mr. WILSON: Please state how soon you will be able to do it.

Mr. HANSON: I will try to do it while here; I have checked nearly all of them, but I see there is a discrepancy as to some.

After testimony presented on behalf of the receiver and motion by his counsel for postponement, on the forenoon of Wednesday, September the fourth, further testimony on behalf of intervenors was offered as follows:

Mr. HANSON: I ask for a subpœna for Mr. Bradley, the car accountant of the C., P. & St. L.

(The subpœna having been served, when the witness arrived he was sworn and testified. But pending his arrival, Mr. Beacham was recalled and re-examined as follows:)

153 *Testimony of W. E. Beacham.*

Mr. BEACHAM recalled.

Direct by Mr. HANSON:

Q. I will call your attention to the list of cars which was furnished to you by W. R. Bradley, the car accountant of the C., P. & St. L., under date of November 2, 1894, which is attached to the testimony taken in this proceeding as Exhibit "F," and ask you if any junction or car reports were made by the receiver or his car accountant of the delivery of those cars or any of them by the receiver to the Terminal Association prior to the fire of October 28, 1894?

A. I have carefully checked that statement which you hold in your hand just referred to, with an eye to verifying it, and this has been done several times since there was a prospect of controversy over this matter, and I can state of my own knowledge that no report has ever been made showing the delivery of any of those cars that were destroyed to the Terminal railroad or to any other railroad.

Q. Does that include the car damaged too?

A. No, sir, that does not include the cars damaged.

Q. Now I will ask with respect to this list.

A. Cars damaged?

Q. No, sir, list of cars in that paper there, whether you checked that over, Exhibit "F," and I ask you with reference to the cars in that exhibit, in that statement furnished by Mr. Bradley to you, whether there was any junction report received of any of those cars?

A. No, sir; none received.

Q. Have you gone over all the cars mentioned and described in these intervening petitions in controversy, I mean the C, M. & St. P. cars, to ascertain whether any reports, such as I have named, had been received by you or made by the car accountant of the receiver, Mr. Bradley?

A. Yes, sir, I have.

Q. Any such reports made or received?

A. No, sir.

Cross-examination by Mr. WILSON:

Q. How do you know no reports were made; because you were present on the ground, or do you predicate your statement on the ground that you didn't receive any?

154 A. My statement is based on the fact that none were received.

Mr. HANSON: Mr. Warren, we have agreed if there was any error in figures, that should be remedied. Will you allow these papers to be put in by way of explanation? I am willing that Mr. Gregory's statement attached should go along. I don't expect to change the amount in the stipulation by that, but I do not wish to be in a situation to allow the owners to say that I have not put that before the master.

Mr. WILSON: I am informed by our claim agent that the difference does not come from clerical error, but from the method or process of reaching the matter; I decline to enlarge or amplify in any way the stipulation already signed and placed on record.

Testimony of W. R. Bradley.

W. R. BRADLEY sworn.

Direct by Mr. HANSON:

Q. You are the car accountant of the receiver in this proceeding?

A. Yes, sir.

Q. And you were so at the time of the fire in East St. Louis in October last, and prior to that time?

A. Yes, sir.

Q. Was it a practice at that point when a car of the Chicago, Milwaukee and St. Paul Company was delivered to the Terminal Association, to make a report of the delivery of that car?

A. Yes, sir, when that delivery was reported to me.

Q. When that delivery was reported you would make the customary report to the Chicago, Milwaukee and St. Paul?

A. Yes, sir.

Q. That was true with reference to any other company whose cars had been delivered?

A. Yes, sir.

Q. There were four C., B. & Q., cars containing barley consigned to Teichman Commission Company, of the following numbers: Ten eight fourteen; eleven nine sixty-two; fourteen three eighty-five, and nineteen nineteen; have you made any report of the delivery of those four cars to the C., B. & Q. prior to the fire?

A. Don't remember.

Q. Will you take these numbers and look the matter up at once; and in addition to the numbers I have given (witness having copied those) I will give you these: St. Louis, Belleville and Southern Illinois car number twenty-nine seventy-five, C., N. O. & P. T., thirty-four thirty-three, three C's and V twelve six eleven; all together seven cars. Please consult your records and look that up.

(In the absence of the witness occurred the following:)

Mr. WILSON: As to the motion for application to his honor, Judge Allen, for leave to file replication, if necessary to be filed, it is agreed that it shall meanwhile be filed with the master, and the hearing of the same postponed to the occasion of the next visit of Messrs. Hanson and Cary to this city, the delay in the meantime to be without any prejudice whatever to either party.

(The witness reappeared and answered as follows:)

A. I do not find that junction cards have been sent showing the delivery of these cars to the lines mentioned.

Cross-examination by Mr. WILSON:

Q. Had you in the meantime, between the twenty-eighth of October and the date when you should have sent out junction notices, been notified that they had been burned by the fire?

A. I learned a few days after that they had been burned—about five days after the fire.

Redirect by Mr. HANSON:

Q. Up to the time of the fire you had made no junction report and had received none from them?

A. No, sir.

Further hearing postponed provisionally to October second.

EXHIBIT "L."

Exhibit L to Testimony, Manifest of Freight Transferred.

Car No. 680. Terminal Railroad Association of St. Louis.
C., M. & St. P. Manifest of freight transferred.
From C., P. & St. L. R. R. To Eads R. R. Oct. 10, 1894.

Consignor.	Consignee & destination.	Description.	Wt.	Charges.
C., M. & St. P. Wykoff.	Teichman Com. Co. 16th St. & Union depot. St. Louis, Mo.	Barley.	30,000.	$51.0

Form 287¼

EXHIBIT M.

CHICAGO, MILWAUKEE & ST. PAUL RAILWAY.

Car No. 32986. SPECIAL WAY-BILL. *Way-Bill No. 379.*

Whose car, St. P. *from La Crosse to East St. Louis, Ill.* *Date 10/12, 1894.*

This form must be used in all cases in billing Flour or Product made from Wheat, billed to be milled "in transit"

Consignor.	Consignee and Destination.	No. of Pkgs.	Description of Articles.	Weight.	Rate.	Local Unpaid.	Adv. Charges.
W. C. Co.	Teichman Com. Co. St. Louis, Mo.		Barley	40400	7	28.28	
			S L			28.28	

Via Rock Island
R. I. and P. & J. S. E. Line.

Paid.

Free a c Transit.
Rate applies to St. Louis, Mo.

Copy.

CHICAGO, MILWAUKEE & ST. PAUL RAILWAY.

SPECIAL WAY-BILL.

Whose Car.....
Car No...... *W.-B. No.*.....
From.....
To.....*189*

CONDUCTORS are positively forbidden to take into their train any loaded car without a regular Way-Bill.

AGENTS at the end of each Division or Destination of Way-Bill will see that names of Conductors and dates of arrivals and departures are endorsed on the Way-Bill.

The use of Memorandum Way-Bills is positively forbidden.

W. G. COLLINS,
General Superintendent.

Departed from.....*Seals*.....
Arrived at.....*Conductor.*
Departed from.....*Seals*.....
Arrived at.....*Conductor.*
Departed from.....*Seals*.....
Arrived at.....*Conductor.*
Departed from.....*Seals*.....
Arrived at.....*Conductor.*
Departed from.....*Seals*.....
Arrived at.....*Conductor.*
Departed from.....*Seals*.....
Arrived at.....*Conductor.*
Departed from.....*Seals*.....
Arrived at.....*Conductor.*
Departed from.....*Seals*.....
Arrived at.....*Conductor.*
Departed from.....*Seals*.....
Arrived at.....*Conductor.*
Received at the destined Station,
.....*Agent.*

Form 287¼

CHICAGO, MILWAUKEE & ST. PAUL RAILWAY.

Car No. 20022. SPECIAL WAY-BILL. *Way-Bill No. 378*

Whose car, S. W. *from La Crosse to East St. Louis, Ill.* *Date 10 12, 1894.*

This form must be used in all cases in billing Flour or Product made from Wheat, billed to be milled "in transit."

Consignor.	Consignee and Destination.	No. of Pkgs.	Description of Articles.	Weight.	Rate.	Local Unpaid.	Adv'd Charges.
W. C. Co.	Teichman Com. Co. St. Louis, Mo.		Barley. S L	41100	7	28.77	
	Via Rock Island R. I. and P. & J. S. E. Line. Free a c Transit Rate applies to St. Louis, Mo.					28.77 Paid.	

Copy.

CHICAGO, MILWAUKEE & ST. PAUL RAILWAY.

SPECIAL WAY-BILL.

Whose Car .....

Car No. ..... *W.-B. No.* .....

From .....

To *189*

CONDUCTORS are positively forbidden to take into their train any loaded car without a regular Way-Bill.

AGENTS at the end of each Division or Destination of Way-Bill will see that names of Conductors and dates of arrivals and departures are endorsed on the Way-Bills.

The use of Memorandum Way-Bills is positively forbidden.

W. G. COLLINS,
General Superintendent.

Departed from ..... *Seals* .....
Arrived at ..... *Seals* ..... *Conductor.*

Departed from ..... *Seals* .....
Arrived at ..... *Seals* ..... *Conductor.*

Departed from ..... *Seals* .....
Arrived at ..... *Seals* ..... *Conductor.*

Departed from ..... *Seals* .....
Arrived at ..... *Seals* ..... *Conductor.*

Departed from ..... *Seals* .....
Arrived at ..... *Seals* ..... *Conductor.*

Departed from ..... *Seals* .....
Arrived at ..... *Seals* ..... *Conductor.*

Departed from ..... *Seals* .....
Arrived at ..... *Seals* ..... *Conductor.*

Departed from ..... *Seals* .....
Arrived at ..... *Seals* ..... *Conductor.*

Received at the destined Station, ... *Agent.*

Form 257½

CHICAGO, MILWAUKEE & ST. PAUL RAILWAY.

Car No. 1100. **SPECIAL WAY-BILL.** **Way-Bill No. 483.**

Whose car, St. P. **from La Crosse to East St. Louis, Ill.** **Date 10/18, 1894.**

This form must be used in all cases in billing Flour or Product made from Wheat, billed to be milled "in transit."

Consignor.	Consignee and Destination.	No. of Pkgs.	Description of Articles.	Weight.	Rate	Local Unpaid.	Adv. Charges.
W. C. Co.	Teichman Com. Co. St. Louis, Mo.		Barley. S L	30000	7	21.00	
	Via Rock Island R. I. & P. & J. S. E. Line.						21.00
			Free a c Transit. Rate applies to St. Louis, Mo.				Paid.

Copy.

CHICAGO, MILWAUKEE & ST. PAUL RAILWAY.
SPECIAL WAY-BILL.

Whose Car.....
Car No......*W.-B. No.*.....
From.....
To.....*189*

CONDUCTORS are positively forbidden to take into their train any d car without a regular Way-Bill.

AGENTS at the end of each Division or Destination of Way-Bill will see that names of Conductors and dates of arrivals and departures are endorsed on the Way-Bills.

The use of Memorandum Way-Bills is positively forbidden.

W. G. COLLINS,
General Superintendent.

Departed from.....*Scals*.....
Arrived at.....*Scals*.....*Conductor.*

Departed from.....*Scals*.....
Arrived at.....*Scals*.....*Conductor.*

Departed from.....*Scals*.....
Arrived at.....*Scals*.....*Conductor.*

Departed from.....*Scals*.....
Arrived at.....*Scals*.....*Conductor.*

Departed from.....*Scals*.....
Arrived at.....*Scals*.....*Conductor.*

Departed from.....*Scals*.....
Arrived at.....*Scals*.....*Conductor.*

Departed from.....*Scals*.....
Arrived at.....*Scals*.....*Conductor.*

Departed from.....*Scals*.....
Arrived at.....*Scals*.....*Conductor.*

Received at the destined Station,
.....*Agent.*

Form 287¼

CHICAGO, MILWAUKEE & ST. PAUL RAILWAY.

Car No. 15254. **SPECIAL WAY-BILL.** ***Way-Bill No. 507.***

Whose car, St. P. from La Crosse to East St. Louis, Ill. Date 10/20, 1894.

This form must be used in all cases in billing Flour or Product made from Wheat, billed to be milled "in transit."

Consignor.	Consignee and Destination.	No. of Pkgs.	Description of Articles.	Weight.	Rate.	Local Unpaid.	Adv. Charges.
W. C. Co.	Teichman Com. Co. St. Louis, Mo.		Barley S L	30400	7	21²⁸	
	Via Rock Island R. I. & P. & J. S. E. Line.						21²⁸
			Free a c Transit.				
	Rate applies to St. Louis, Mo.						Paid.

Copy.

CHICAGO, MILWAUKEE & ST. PAUL RAILWAY.

SPECIAL WAY-BILL.

Whose Car.....

Car No...... *W.-B. No.*.....

From.....

To.....

.....*189*

CONDUCTORS are positively forbidden to take into their train any loaded car without a regular Way-Bill.

AGENTS at the end of each Division or Destination of Way-Bill will see that names of Conductors and dates of arrivals and departures are endorsed on the Way-Bills.

The use of Memorandum Way-Bills is positively forbidden.

W. G. COLLINS,
General Superintendent.

Departed from.....*Seals*.....
Arrived at.....*Seals*.....*Conductor.*

Departed from.....*Seals*.....
Arrived at.....*Seals*.....*Conductor.*

Departed from.....*Seals*.....
Arrived at.....*Seals*.....*Conductor.*

Departed from.....*Seals*.....
Arrived at.....*Seals*.....*Conductor.*

Departed from.....*Seals*.....
Arrived at.....*Seals*.....*Conductor.*

Departed from.....*Seals*.....
Arrived at.....*Seals*.....*Conductor.*

Departed from.....*Seals*.....
Arrived at.....*Seals*.....*Conductor.*

Departed from.....*Seals*.....
Arrived at.....*Seals*.....*Conductor.*

Received at the destined Station,

.....*Agent.*

Form 287.

181
160½

CHICAGO, MILWAUKEE & ST. PAUL RAILWAY.

SPECIAL GRAIN WAY-BILL.

Car No...... *Way-Bill No.*.....

Whose Car..... *From*..... *to*..... *Date*..... *189*

This form of Way-Bill must in all cases be used in billing grain, to be floured or cleaned "in transit." A separate Way-Bill must be used for each Car.

CONSIGNOR.	CONSIGNEE AND DESTINATION.	ARTICLE.	Weight.		Rate.	Freight Charges.		Advanced Charges		Prepaid.	

Marked Capacity of Car,..... *lbs.* Marked Capacity of Car must always be noted on Way-Bill for Car-load Freight.

Chicago, Milwaukee & St. Paul R'y.

Special Grain Way-Bill.

Whose Car.....

Car No...... *W. B. No.*.....

From.....

To.....

.....*189*....

CONDUCTORS are positively forbidden to take into their Train any loaded Car without a regular Way-Bill.

AGENTS at the end of each Division or Destination of Way-Bill will see that names of Conductors and dates of arrivals and departures are endorsed on the Way-Bills.

The use of Memorandum Way-Bills is positively forbidden.

Departed from..... ..... *Seals*..... ....

Arrived at.....*Seals*.....

.....*Conductor No*.....

Departed from..... .... *Seals*..... ....

Arrived at.....*Seals*.....

....*Conductor No*..... .....

Departed from.....*Seals*.....

Arrived at..... .....*Seals*..... ....

.....*Conductor No*..... .....

Departed from.. .....*Seals*..... ...

Arrived at.. .....*Seals* .....

..... *Conductor No*.....

Departed from..... ..... *Seals*.....

Arrived at..... .....*Seals*.....

....*Conductor No*.....

Departed from.....*Seals*.....

Arrived at..... ....*Seals*.....

....*Conductor No*.....

Departed from..... ....*Seals* .. ..

Arrived at.....*Seals*.. .. ..

.....*Conductor No*.....

Received at the Destined Station.....*189*....

Seals..... ....*Agent.*

160 The following are the written insertions made in the C., M. & St. Paul special grain waybill, of which the foregoing is a true blank form, as the same were introduced in evidence and made exhibits:

EXHIBIT "N."

Waybill No. 80.

Chicago, Milwaukee & St. Paul R'y.

M. & N. Car No. 1154. Oct. 11, 1894. Waybill No. 80.

Freight forwarded from Ossian, Iowa, to East St. Louis, Ills., via Rock Island R., I. & P. & J. S. E.

Consignor.	Consignee & destination.	Description.	Rate.	Wt.	Charges.
J. H. De G. c. o. G. & Co. C.	Teichman Com. Co. St. Louis, Mo.	Bulk barley.	13½.	40,000.	$50.00.

Chicago, Milwaukee & St. Paul R'y.

Chicago, Milwaukee & St. Paul R'y.

Car M. & N. No. 38108. 10/13, 1894.

Freight forwarded from Ossian, Iowa, to East St. Louis, Ills., a Via Rock Island R. I. & P. J. S. E.

Consignor.	Consignee & destination.	Description.	Rate.	Wt.	Charges.
J. H. De G.	Teichman Com. Co. St. Louis, Mo.	Bulk barley.	13½.	40,000.	$60.00.

1819

147-148

Station receipts.

Blue print

Chicago, Milwaukee & St. Paul Railway Co.

No.

Shipped by

Consigned to

Articles

189

Agent.

No. Stations 189

RECEIVED from

in apparent good condition

MARKS AND NUMBERS.	DESCRIPTION OF PROPERTY.	WEIGHT.

As described above, contents and value unknown, to be transported by the CHICAGO, MILWAUKEE & ST. PAUL RAILWAY CO., over the line of this Railroad to

their warehouse at

subject to the conditions printed on the back hereof, which conditions form a part of this contract, and the acceptance of this contract is a consent to and agreement with all of such conditions, whether this receipt be signed by the consignor or not. The property described in this receipt is received subject to the classifications and tariffs in effect on the date of issue of this receipt, and is subject to change of classification and tariffs between the time of receipt and the time of delivery at destination. The rate applicable to the property described in this receipt is that in effect on the date the property is received at the destination named herein, unless a different rate is specified in writing by the agent at the point of shipment.

CONDITIONS AND RULES

FORMING PART OF THE WITHIN CONTRACT.

1. The Corporation will not receive or carry any Bank Bills, Drafts, Notes, Deeds Contracts, evidence of property or other writings, or be responsible for their loss or injury.

2. No Conductor, or other agent of the Corporation, has power to receive in charge of Bank Notes, Money or Securities, or to receive, forward, or deliver the same, except as an accommodation, without extra compensation, and he will not be responsible for the same, or for any such articles.

3. No Gold or Silver Coin or Bullion, or manufactured articles of gold or silver, Watches, Jewelry or Precious Stones, Plated Ware, Clocks, Time Pieces, Glass, Silks, Laces, Furs, Fashionable Wearing Apparel, or Paintings, Statuary, Curiosities, Works of Art or Musical Instruments, will be carried unless specially agreed to in writing, stating the true value thereof, and the Company will not be responsible for articles and their value, and unless the proper extra price for the carriage are paid, nor for such articles beyond the sum of fifty dollars.

4. Carpenter and combustible articles of any description, will be taken only on special terms and rates. If found secreted among other freight, or received, the shipper or consignee will be held responsible for consequence of fire same may occasion.

5. Articles will not be received for transportation unless properly packed in suitable Cases, Boxes, Bales or Packages, and in the manner they are to be delivered, otherwise they will not be considered liable for damage to the same, or for loss or subsequent damage to the contents of packages not properly protected by their coverings. Nor will the Company be responsible for breaking, or which occurs without the negligence or fault of the Company or its agents. All property is subject to stoppage in transit necessary.

Goods in bundles will not be considered as properly packed, and the company will not be responsible for any loss or parts of the same, Hoops or other Ends, if not covered with canvas.

No other saw for delivery of Lumber, Hoops or other Ends, if not covered with canvas will be made.

6. The Corporation will not be responsible for damage to property by fire, whether from, during accidents or unavoidable causes, or by theft or injury to property by thieves, or by the violence of mobs or other persons, nor for any loss or damage to property by fire, while in their freight depot or other destination will not be liable for the non-delivery of such property in any certain time, nor in time nor for any particular train.

The charges on letter-of-notice must always be prepaid.

The charges on perishable property must always be prepaid.

7. The Corporation will not be responsible for damage to property by the perils of the sea, nor in transit or shipment, however occasioned, but they will forward the same with all reasonable dispatch as the general business of the Corporation will permit.

8. The Corporation will not be responsible for loss of, after the property has been placed in its depot or upon its platform, or for damage to property by fire, while in their freight depot or elsewhere, the Company will not be liable.

9. Storage, at customary rates, will be charged for all property not taken from the warehouse within one day after arrival.

10. The Corporation will be responsible for loss or injury happening to or occasioned to live stock in the transportation thereof, over the railroads to the same, nothing, nor for any damage, however occasioned, to any animals or any description, transported or carried on cars owned or controlled by the Company.

11. The Corporation will not be responsible for loss or damage to any article in live or otherwise, unless the value thereof is stated in writing.

12. Goods or property consigned to any place of the Company's line of road or to any point or place where the terminal will be sent forward with as little delay as practicable, but the Company will not be responsible for any loss or damage which may arise from unavoidable delay in forwarding the same unconditionally, for transportation, the Company acting for the time only as carriers. The Corporation will not be responsible for any loss, damage or injury to property after the same shall have arrived at the station mentioned herein, and notice thereof given to the consignee or his agent, and a reasonable time for its removal shall have elapsed, but the Company shall have a lien upon all freight and baggage to secure the payment of storage.

13. No local freight shall be subject to a minimum charge or tracking and would of 40 per car for each 24 hours detention or fraction thereof after the expiration of 48 hours from the arrival at destination, and after such notice of the arrival of the same has been given to the consignee, and the Consignee or Consignee shall pay the C. M. & St. P. Ry Company the expense of drayage and warehousing, and other charges, and the Company shall have a lien upon the freight in addition to its own freight charges and tack charges.

Chicago, Milwaukee & St. Paul R'y.

Special Grain Way-Bill.

Whose Car .....

Car No. ..... *W. B. No.* .....

From .....

To .....

..... *189* ....

CONDUCTORS are positively forbidden to take into their Train any loaded Car without a regular Way-Bill.

AGENTS at the end of each Division or Destination of Way-Bill will see that names of Conductors and dates of arrivals and departures are endorsed on the Way-Bills.

The use of Memorandum Way-Bills is positively forbidden.

Departed from..... *Seals*..... ....

Arrived at .....*Seals*.....

.....*Conductor No*.....

162 The following are the written insertions made in the C., M. & St. P. station receipts, of which the foregoing is a true blank form, as the same were introduced in evidence and made exhibits.

Station Receipt.

OSSIAN, IOWA, 10/11, 1894.

Received from J. H. De Graff c. o. G. & Co.
Teichman Commission Co.
St. Louis, Mo.

Via East St. Louis		Bulk barley	80,000	
St. P. 1154		50,000		833/16
17868		50,000		833/16

To warehouse St. Louis, Mo.

W. S. CODY, *Ag't.*

OSSIAN, IOWA, 10/10, 1894.

Received from J. H. De Graff c. o. G. & Co.
Teichman Com. Co.

St. Louis, Mo.			Bulk barley	160,000	
Via East St. Louis					
St. P.	35168	cap.	40,000	833/16	
"	44562		660,000	833/16	
"	38108		40,000	833/16	
"	30290		40,000	833/16	
					3,333/16

To warehouse St. Louis, Mo.

W. F. CODY, *Agent.*

The following are the written insertions made in the special waybill, of which the foregoing is a true blank form as the same were introduced in evidence and made exhibits:

EXHIBIT "O." *Waybill.*

Chicago, Milwaukee & St. Paul R'y
Via Rock Island R. I. & P. and J. S. E.
Car # 6842.
St. P.
From McGregor to East St. Louis, Oct. 22, 1894.
McM. Teichman Com. Co.
St. Louis, Mo. Barley 30,270 7 $21.19
Rate applies to St. Louis.

163 Chicago, Milwaukee & St. Paul R'y.
Car #10720
St. P. From McGregor to East St. Louis, Oct. 22, 1894.
McM. Teichman Com. Co.
St. Louis, Mo.
Barley 28,000 7 $19.60.
Rate applies to St. Louis.

Chicago, Milwaukee & St. Paul R'y
Via Rock Island, R. I. & P. & J. S. E.
Car #18126
St. P. From McGregor to East St. Louis, Oct. 19, 1894.

McM. Teichman Com. Co.
St. Louis, Mo.
Barley 35,280 7 $24.70.
Rate applies to St. Louis.

Chicago, Milwaukee and St. Paul R'y
Via Rk. Island, R. I. & P. and J. S. E.
Car # 3728.
St. P. From McGregor to East St. Louis, Oct. 19, 1894.
McM. Teichman Com. Co.
St. Louis, Mo.
Barley 30,020 7 $21.01.
Rate applies to St. Louis.

Chicago, Milwaukee & St. Paul R'y
Via Rock Island, R. I. & P. and J. S. E.
Car # 4126.
St. P. From McGregor to East St. Louis, Oct. 16, 1894.
McM. Teichman Com. Co.
St. Louis, Mo.
Barley 28,100 7 $19.68.
Rate applies to St. Louis.

Chicago, Milwaukee and St. Paul R'y
Via Rock Island, R. I. & P. and J. S. E.
Car # 2598.
St. P. From McGregor to East St. Louis, Oct. 16, 1894.
McM. Teichman Com. Co.
St. Louis.
Barley 30,150 7 $21.11.
Rate applies to St. Louis.

164 Chicago, Milwaukee & St. Paul R'y
Via Rock Island, R. I. & P. and J. S. E.
Car # 12336.
St. P. From McGregor to East St. Louis, Oct. 16, 1894.
McM. Teichman Com. Co.
St. Louis, Mo.
Barley 28,180 7 $19.73.
Rate applies to St. Louis.

Chicago, Milwaukee & St. Paul R'y
Via Rock Island, R. I. & P. and J. S. E.
Car # 37506.
St. P. From McGregor to East St. Louis, Oct. 16, 1894.
McM. Teichman Com. Co.
St. Louis.
Barley 34,440 7 $24.11.
Rate applies to St. Louis.

McGregor, Iowa, *Oct.* 22, 1894.

Received from T. McMichael & Son.
Bulk barley.
Car # 6842 St. P. 30,270 lbs.
Teichman Com. Co., St. Louis. C. F. SPAULDING.

Freight prepaid.
Account cleaned in transit.

1822

151 - 152

Station receipt.

Chicago, Milwaukee & St. Paul Railway Co.

No.

Shipped by

Consigned to

Articles

189

Agent.

No. Stations 189

RECEIVED from

in apparent good condition

MARKS AND CONSIGNEE.	DESCRIPTION OF PROPERTY.	WEIGHT.

CONDITIONS AND RULES

FORMING PART OF THE WITHIN CONTRACT.

1. The Corporation will not receive or carry any Bank Bills, Drafts, Notes, Deeds Contracts, evidences of property or other writings, or be responsible for their loss or injury.

2. No Conductor, or other agent of the Corporation, is authorized to make charges of Bank Notes, Money or other valuable papers or things delivered to him for safekeeping, or to receive any package or article not entered on the Company's way-bill, or for such articles.

3. No Gold or Silver Coin or Bullion, or manufactured articles of gold and silver, or Jewelry Watches, Pictures, Plated Articles, Statuary, Musical Instruments, Glass, Silks, Laces, will be carried by the Company unless specially contracted for in writing, and the value and character and kind of such articles be plainly expressed in a memorandum to be signed by the shipper, stating the character and kind of articles and their value, and unless the proper extra price for the carriage and responsibility for such articles be paid or secured.

4. Corporation will not be responsible for any loss or damage to Cotton, Woolen, Linen, Hemp, Flax, Manufactures of the same, Hardware, Cutlery, Stoves and Castings, Marble, Looking Glasses, Window Glass, Paints, Oils, Liquids, put up in glass or earthenware, Cabinet Ware and Furniture still less, be taken at the owner's risk of these articles unless specially agreed to the contrary.

5. Corrosive and combustible articles of any description will be taken only on special terms and at the owner's risk of damage in consequence of the same being so stowed, the shipper or consignee will be required to release the Corporation from all claims for damage.

6. Articles will not be received for transportation unless properly packed in suitable Cases Boxes, Barrels or Packages, and each is marked, or well and clearly labeled with the name of the Consignee, or the articles will not be considered as properly packed, and the Company will in no case be responsible for loss, injury or damages which might have been avoided if this rule had been complied with. All property is subject to stoppage in transit unless otherwise ordered by the party or his agents. All property is subject to examination at such reasonable time, and in the presence of the non-delivery of such property in any certain time, nor in the case for any particular market.

Goods in bundles will not be considered as properly packed, and the company will not be responsible for any loss of parts or of the whole of such packages.

The charges on hollowed marble in sections to be prepaid.

The charges on perishable property must always be prepaid.

7. The Corporation will not undertake or agree to carry property for any particular train, nor in time for any special market, nor to make any connection with any other train or boat, but will use due diligence so far as depends, however, upon itself, that they will forward the same with all reasonable dispatch in the general business of the Corporation will permit it.

8. The Corporation will only be liable as warehousemen, after the property has been placed in their depot, and for a reasonable time to be allowed to the party for him to have removed the same, but the Company will not be liable.

9. Storage, at customary rates, will be charged for all property not taken from the warehouse within one day after arrival.

10. The Corporation will not be responsible for loss or injury happening to or occasioned by wrecks or accidents, or delays or detentions, or by the stoppage of the trains by any cause whatever, or in unloading the same, nor for any damages however caused to live stock or animals of any description, transported or carried upon their railway or in their cars or vehicles.

11. The Corporation will not be responsible for the loss of property by fire, while in their freight depot or warehouse, the Company will be responsible for such property by fire, while in their freight depot or warehouse, the Company will not be liable.

12. Goods or property consigned to any place of the Company's line of road, or to any point or place beyond its terminal, will be sent forward with as reasonable dispatch as the general business of the Corporation, at its warehouse within mentioned, will permit, but the Company reserve the right to forward the same intermediately, the transportation, the Company acting as the agents of delivery to such carrier or freight-man, as the agents of the consignee of consignor, and not as carriers, and the same shall have arrived at the within-mentioned Company's station for delivery to the consignee, consignee or to the connecting carriers or freight-men for transportation.

13. No station agent or clerk has authority to alter or vary any of these Rules and Conditions, nor shall such agent or clerk have authority to make any contract in relation to the transportation of property, nor shall such agent or clerk be allowed more than six hours after the expiration of 48 hours from the arrival at destination, and after the expiration of 72 hours, the Company shall be authority to sell the property or so much thereof as may be sufficient to pay the charges for transportation, storage and handling and the Consignee or Consignor shall pay the C. M. & St. P. Ry Company the expense of such sale, and warehousing same, and for such purpose the Company shall have a lien upon the freight in addition to its own freight charges and back charges.

The following are the written insertions made in the station receipts of which the foregoing is a true blank form, as the same were introduced in evidence and made exhibits.

166 McGREGOR, IOWA, *Oct.* 22, 1894.

Received from T. McMichael & Son,
Bulk barley.

Teichman Commission Co.
St. Louis, Mo. Car #10720 St. P. 28,000
Freight prepaid.
Account cleaned in transit.

C. F. SPAULDING.

McGREGOR, IOWA, *Oct.* 19, 1894.

Received from T. McMichael & Son,
Bulk barley.

Teichman Commission Co.
St. Louis, Mo. Car #18126 St. P. 35,280
Freight prepaid.
Account cleaned in transit.

C. F. SPAULDING.

McGREGOR, IOWA, *Oct.* 19, 1894.

Received from T. McMichael & Son,
Bulk barley.

Teichman Com. Co.
St. Louis, Mo. Car #3278 St. P. 30,020
Freight prepaid.
Account cleaned in transit.

C. F. SPAULDING.

McGREGOR, IOWA, *Oct.* 16, 1894.

Received from T. McMichael & Son,
Bulk barley.

Teichman Com. Co.
St. Louis, Mo. Car #4126 St. P. 28,110
Freight prepaid.
Account cleaned in transit.

C. F. SPAULDING, *Agent.*

McGREGOR, IOWA, *Oct.* 16, 1894.

Received from T. McMichael & Son,
Bulk barley.

Teichman Commission Co.
St. Louis, Mo. Car #2598 St. P. 30,150
Freight prepaid.
Account cleaned in transit.

C. F. SPAULDING, *Agent.*

167 McGREGOR, IOWA, *Oct.* 16, 1894.

Received from T. McMichael & Son,
Bulk barley.

Teichman Commission Co.
St. Louis, Mo. Car #12336 St. P. 28,180
Freight prepaid.
Account cleaned in transit.

C. F. SPAULDING, *Agent.*

McGregor, Iowa, *Oct.* 16, 1894.

Received from T. McMichael & Son,
Bulk barley.
Teichman Commission Co.
St. Louis, Mo. Car # 37506 St. P. 24,440
Freight prepaid.
Account cleaned in transit.

C. F. SPAULDING.

Exhibit "P."

Waybill No. 307.

Chicago, Milwaukee & St. Paul R'y.
Car mil. # 11836 Sept. 24, 1894 W. B. # 307
Freight forwarded from Prairie du Chien to East St. Louis, Ills.
From H. E. Co. to Teichman Commission Co.
St. Louis, Mo. Barley 31900 7 $22.33. Paid.
Rate applies to St. Louis.

Chicago, Milwaukee & St. Paul R'y.
Car mil. # 33090 Sept. 24, 1894. W. B. # 306.
Freight forwarded from Prairie du Chien to East St. Louis, Ills.
From H. E. Co. to Teichman Commission Co.
St. Louis, Mo. Barley 41400 7 $28.98. Paid.
Rate applies to St. Louis.

Prairie du Chien, Wis., *Sept.* 24, 1894.

Teichman Com. Co., C., M. & St. P. # 33090 41,400. Barley # 2
St. Louis, Mo. " " " " " # 11836 31,900. Barley # 2
East St. Louis.

J. B. BRANUM, *Weighmaster.*

168 Prairie du Chien, *Sept.* 24, 1894.

Received from Hunting Elevator Co.
Teichman Commission Co. Car # 33090 Barley W. B. 306 41,400
St. Louis, Mo. Car # 11836 Barley W. B. 307 31,900
Via East St. Louis.

A. D. PHILLIPS, *Agent.*

Chicago, Milwaukee & St. Paul R'y.
Car mil. # 16802 Oct. 20, 1894. W. B. # 424.
Freight forwarded from Prairie du Chien to East St. Louis, Ills.
To Teichman Com. Co.
St. Louis, Mo. Barley 31,900 7 $22.33. Paid.
Rate applies to St. Louis.

Chicago, Milwaukee & St. Paul R'y.
Car mil. # 46648 Oct. 20, 1894. W. B. # 421.
Freight forwarded from Prairie du Chien to East St. Louis, Ills.
Teichman Com. Co.
St. Louis, Mo. Barley 40,400 7 $28.28. Paid.
Rate applies to St. Louis.

Chicago, Milwaukee & St. Paul R'y.
Car mil. # 7286 Oct. 20, 1894. W. B. # 420.
Freight forwarded from Prairie du Chien to East St. Louis, Ills.
Teichman Com. Co.
St. Louis, Mo. Barley 31,550 7 $22.08. Paid.
Rate applies to St. Louis.

Chicago, Milwaukee & St. Paul R'y.
Car mil. # 178 Oct. 20, 1894. W. B. # 419.
Freight forwarded from Prairie du Chien to East St. Louis, Ills.
Teichman Com. Co.
St. Louis, Mo. Barley 40,700 7 $28.49. Paid.
Rate applies to St. Louis.

Chicago, Milwaukee & St. Paul R'y.
Car mil. # 12 Oct. 12, 1894. W. B. # 266.
Freight forwarded from Prairie du Chien to East St. Louis, Ills.
Teichman Com. Co.
St. Louis, Mo. Barley 30,700 7 $21.49. Paid.
Rate applies to St. Louis.

169 PRAIRIE DU CHIEN, WIS., *Oct.* 12, 1894.

Teichman Com. Co. C., M. & St. P. #12 30,700 Barley #3
St. Louis, Mo.
Via East St. Louis.

J. B. BRANUM,
Weighmaster.

PRAIRIE DU CHIEN, WIS., *Oct.* 20, 1894.

Teichman Com. Co.	M. & N.	#178	40,700	Barley	#3
St. Louis, Mo.	C., M. & St. P.	#7286	31,550	Barley	#3
East St. Louis.	C., M. & St. P.	#16802	31,900	Barley	#3
	C., M. & St. P.	#46648	40,400	Barley	#3

J. B. BRANUM,
Weighmaster.

PRAIRIE DU CHIEN, *Oct.* 12, 1894.

Received from Huntting Elevator Co.
Teichman Com. Co. Car # 12 Barley 30,700
St. Louis, Mo.
Via East St. Louis.

W. B. 266.
A. D. PHILLIPS, *Agent.*

PRAIRIE DU CHIEN, *Oct.* 20, 1894.

Received from Huntting Elevator Co.

Teichman Com. Co.	Car # 178	M. & N.	Barley	W. B.	419	40,700
St. Louis, Mo.	# 7286	C., M. & St. P.	Barley	W. B.	420	31,550
	#16802	C., M. & St. P.	Barley	W. B.	424	31,900
Via East St. Louis.	#46648	C., M. & St. P.	Barley	W. B.	421	40,400

A. D. PHILLIPS, *Agent.*

EXHIBIT "Q."

Waybill.

Chicago, Milwaukee & St. Paul R'y.
Car C., M. & St. P. #680. Oct. 1, 1894.
Rock Island via R. I. & P., Jacksonville S. E. line.
Freight forwarded from Wykoff, Minn., to East St. Louis.
Teichman Commission Co.
St. Louis, Mo.

Bulk barley. 30,000 $51.00

WYKOFF, *Sept.* 29, 1894.

Received from S. Y. Hyde Elevator Co.
Teichman Com. Co. C., M. & St. P. Car #680
St. Louis, Mo. Bulk barley.
Via East St. Louis.

J. N. SOLBERG, *Agent.*

170 LA CROSSE, WIS., *Oct.* 16, 1894.

Received from S. Y. Hyde Elevator Co. 5 cars barley.

Teichman Com. Co.,	St. L., B. & S. I.,	#20975	40,000#
St. Louis, Mo.,	C., B. & Q.,	#10814	30,000#
	C., B. & Q.,	#1919	30,000#
Via East St. Louis,	C., B. & Q.,	#11962	30,000#
	C., B. & Q.,	#14385	30,000#

J. C. HEITBAHN, *Agent.*

The following are the written insertions made in C., M. & St. P. waybills, of which the foregoing is a true blank form, as the same were introduced in evidence and made exhibits:

Chicago, Milwaukee & St. Paul R'y. W. B. #453.

Car St. L., B. & S. I. From La Crosse to East St. Louis.

10/16, 1894.

Teichman Com. Co.,
St. Louis, Mo. Barley, 40,000# 7 $28.00. Prepaid.
Via Rock Island.
R. I., P. & J. S. E.
Rate applies to St. Louis, Mo.

Chicago, Milwaukee & St. Paul R'y.

Car #10814. W. B. #455.
C., B. & Q. From La Crosse to East St. Louis. Oct. 16, 1894.
Teichman Com. Co.,
St. Louis, Mo. Barley, 30,000# 7 $21.00. Prepaid.
Via Rock Island.
R. I., P. and J. S. E.
Rate applies to St. Louis, Mo.

Form 267¼.

CHICAGO, MILWAUKEE & ST. PAUL RAILWAY.

Car No...... SPECIAL WAY-BILL. *Way-Bill No.*.....

Whose Car.....*from*.....*to*.....*Date*.....*189*

This form must be used in all cases in billing Flour or Product made from Wheat billed to be milled "in transit."

Consignor.	Consignee and Destination.	No. of Pkgs.	Description of Articles.	Weight.	Rate.	Local Unpaid.	Adv. Charges.

Car #1
C., B. &
Teichm
St. L
Via Ro

171

Form 287.

Car No.

Whose C

Mc

CHICAGO, MILWAUKEE AND ST. PAUL RAILWAY.

SPECIAL WAY-BILL.

Whose Car .....

Car No. ..... *W.-B. No.* .....

From .....

To .....

..... *189*....

CONDUCTORS are positively forbidden to take into their Train any loaded Car without a regular Way-Bill.

AGENTS at the end of each Division or Destination of Way-Bill will see that names of Conductors and dates of arrivals and departures are endorsed on the Way-Bills.

The use of Memorandum Way-Bills is positively forbidden.

W. G. COLLINS,
General Superintendent.

Departed from..... *Seals*..... ....

Arrived at .....*Seals*.....

....*Conductor.*

Departed from..... ..... *Seals*..... ....

Arrived at.....*Seals*.....

..... *Conductor.*

Departed from.....*Seals*.....

Arrived at..... ....*Seals*..... ....

....*Conductor.*

Departed from..... *Seals*..... ...

Arrived at.. .....*Seals*.....

....*Conductor.*

Departed from..... *Seals*.....

Arrived at.....*Seals*.....

.....*Conductor.*

Departed from.....*Seals*.....

Arrived at..... ....*Seals*.....

....*Conductor.*

Departed from..... .....*Seals* .. ..

Arrived at.....*Seals*.. .....

....*Conductor.*

Departed from ....*Seals*.....

Arrived at .. ..*Seals*.....

....*Conductor.*

Received at the destined Station.... ....

....*Agent.*

Chicago, Milwaukee & St. Paul R'y.
Car # 1919. W. B. # 456.
C., B. & Q. From La Crosse to East St. Louis. 10/16/1894.
Teichman Com. Co.
St. Louis, Mo. Barley, 30,000 # 7 $21.00. Prepaid.
Via Rock Island, R. I., P. & J. S. E.
Rate applies to St. Louis, Mo.

171 Chicago, Milwaukee & St. Paul R'y.
Car # 11962
C., B. & Q. W. B. # 457
from La Crosse to East St. Louis.
Teichman Com./Co.
St. Louis, Mo. Barley 3,000 # 7 $21.00 Prepaid.
Via Rock Island
R. I. P. & J. S. E.
Rate applies to St. Louis, Mo.

Chicago, Milwaukee & St. Paul R'y.
Car # 14385 W. B. # 458
C., B. & Q. From La Crosse to East St. Louis, Ill. 10/16, 1894.
Teichman Com. Co.
St. Louis, Mo. Barley 30,000 # 7 $21.00 Prepaid.
Via Rock Island
R. I. P. and J. S. E.
Rate applies to St. Louis, Mo.

The following are the written insertions made in C., M. & St. P. waybills, of which the foregoing is a true blank form as the same were introduced in evidence and made exhibits:

EXHIBIT "R."

Waybill No. 56.

Chicago, Milwaukee & St. Paul R'y.

Car C., M. & St. P. # 46064 Oct. 11, 1894. W. B. # 38
Freight forwarded from Wykoff, Minn., to St. Louis.
From Jacob Rau Via Rock Island R. I. P. & J. S. E.
To Wm. D. Orthwein Grain Co.
Bulk barley 60,000 # $93

Chicago, Milwaukee & St. Paul R'y.

Car C., M. & St. P. # 43222 10/16, 1894. W. B. # 56
Via Rock Island R. I. P. and J. S. E.
Freight forwarded from Wykoff, Minn., to East St. Louis.
From Jacob Rau
To Orthwein Grain Co.
Bulk barley 40,000 # $62.00

Exhibit R.
Way-bill No. 56.

Chicago, Milwaukee & St. Paul Railway Co.

No.

Shipped by

Consigned to

Articles

189

Agent

No. Stations 189

RECEIVED from

in apparent good condition

MARKS AND CONSIGNEE.	DESCRIPTION OF PROPERTY	WEIGHT

CONDITIONS AND RULES

FORMING PART OF THE WITHIN CONTRACT.

1. The Corporation will not receive or carry any Bank Bills, Drafts, Notes, Deeds Contracts, evidences of property, or other agent of the Corporation, is authorized to take charge of Bank Notes, Money or other valuable papers or things, &c., as on or for such articles.

2. No Gold or Silver Coin, Bullion or manufactured articles of gold and silver, or Jewelry, Watches, Precious Articles, Statuary, Musical Instruments, Glass, Silks, Laces, will be carried by the Corporation, for the loss of which it will not be responsible, unless the character and kind of such articles shall have been plainly written, marked and entered on the receipt for the same, and unless the proper extra price for the carriage and responsibility for such articles be paid.

3. Carriages and Sleighs, Show Cases, Machinery, Stoves and Castings, Marble, Looking Glasses, Window Glass, Furniture, Oil Cloths and all articles put up in glass or earthenware, Cabinet Ware and Furniture will only be taken at the owner's risk of fracture or injury from the inherent nature of the articles, and the loading and unloading thereof, unless otherwise agreed upon in writing, is necessary.

4. Gunpowder and combustible or other goods that will be taken only on special terms and at owner's risk of fracture or injury, will be taken from the one end street.

5. Articles will not be received for transportation unless properly packed in suitable Cases Bales or Packages, and each must be well and plainly Marked with the name of the Consignee, and of the station where they are to be delivered, and the Company will in receipted for, in which for loss, injury or damage which might have been avoided by a little more careful and sufficient packing, or which occurs without the negligence or fault of the Company or its agents. All goods to be considered as properly packed, and the company will not be responsible for any loss of parts or of the whole of such packages.

6. Articles will not be received for transportation unless properly packed in suitable Cases Bales or Packages, and each must be well and plainly Marked with the name of the Consignee, and of the station where they are to be delivered, and the Company will in receipted for, in which for loss, injury or damage which might have been avoided by a little more careful and sufficient packing, or which occurs without the negligence or fault of the Company or its agents. All goods to be considered as properly packed, and the company will not be responsible for any loss of parts or of the whole of such packages.

7. No allowance for deficiency of Lemons, Oranges or other fruit, if not covered with canvas will be made.

8. The Corporation will not be responsible for damage sustained by delays from storms, accidents or detentions of trains, or other causes, or for injury to fruit, fish, dressed, or dressed poultry, perishable articles, property, or from injury to property produced by frost, heat or the elements, and the Corporation will not be liable for the non-delivery of such property in any certain time, but in the time it may be delivered.

The charges on perishable property must always be prepaid.

The Corporation will not undertake or agree to carry property by any particular train, nor in time for any particular market, nor are they to be responsible for time of arrival, or for any delay or detention, however occasioned, but will use due diligence to forward the same with all reasonable dispatch. The business of the Corporation will permit.

9. The Corporation will only be liable as warehouseman, after the property has been placed in their freight depot. But for loss or damage to property by fire, while in their freight depot or elsewhere, the Company will not be liable.

The charges on property not taken from the warehouse within twenty-four hours after notice, will be charged for all property not taken from the warehouse within twenty-four hours after notice.

10. The Corporation will not be responsible for loss or injury, happening to or occasioned by animals of any description, in the transportation, or while in the depots or stations of the Company, unless the same be carried upon their railway, or in their cars or vehicles.

11. The Corporation will not be responsible for loss or damage to any article by fire or otherwise, the bulk of which renders it necessary to be forwarded in open cars.

12. Goods or property consigned to any place of the Company's public depots at the principal or place between Chicago and its terminus, via a warehouse within mentioned, will elect, by a manner or freight-man when there are such, known to the station agent at such warehouse, to the purpose of delivery to such same warehouse, as the agent of the consignee or consignee and not as carriers. The Company will not be liable or responsible for any loss, damage or detention for delivery to the owner, consignee or to the connecting carriers or freight-men for transportation.

13. No station agent or clerk has authority to alter or vary any of these Rules and Conditions.

All carload freights shall be subject to a minimum charge for trackage and rental of $1.00 per car for each 24 hours detained after the expiration of 72 hours, this Company shall be at liberty to unload and store the freight in a warehouse of the car or reload and deliver to a warehouse, and the Consignee or Consignee shall pay upon this Company shall have a lien upon the freight in addition to its own freight charges and such charges.

The following are the written insertions made in station receipts, of which the foregoing is a true blank form as the same were introduced in evidence and made exhibits:

Chicago, Milwaukee & St. Paul R'y.

Special Grain Way-Bill.

Whose Car.....

Car No...... *W. B. No.*.....

From.....

To.....

.....*189*....

CONDUCTORS are positively forbidden to take into their Train any loaded Car without a regular Way-Bill.

AGENTS at the end of each Division or Destination of Way-Bill will see that names of Conductors and dates of arrivals and departures are endorsed on the Way-Bills.

The use of Memorandum Way-Bills is positively forbidden.

Departed from..... *Seals*..... ....

Arrived at.....*Seals*.....

.....*Conductor No*.....

Departed from..... .... *Seals*.....

173

Oct. 10, 1894.

Received from Jacob Rau
46064
Wm. D. Orthwein Grain Co.
Bulk barley
East St. Louis.

EDW. J. OLSON, *Agent.*

Oct. 16, 1894.

Received from Jacob Rau
43222
Wm. D. Orthwein Grain Co.
Bulk barley
East St. Louis

EDW. J. OLSON, *Agent.*

EXHIBIT "S."

Station Receipts.

LIME SPRINGS, *Oct.* 13, 1894.

Received from M. L. McNally c. o. H. E. Ele. Co.
St. Paul car # 34574
Teichman Com. Co. Bulk barley 40,000 #
St. Louis, Mo.
Via East St. Louis
To be delivered at St. Louis.

E. S. RENSHAW, *Agent.*

LIME SPRINGS, *Oct.* 15, 1894.

Received from M. L. McNally c. o. H. Ele. Co.
St. Paul car # 32194
Teichman Com. Co. Bulk barley 40,000 #
St. Louis, Mo.

E. S. RENSHAW, *Agent.*

LIME SPRINGS, *Oct.* 18, 1894.

Received from M. L. McNally c. o. H. Ele. Co.
St. Paul car # 43080
Teichman Com. Co.
St. Louis, Mo. Bulk barley 40,000 #
Via East St. Louis.
To be delivered at St. Louis.

E. S. RENSHAW, *Agent.*

174 The following are the written insertions made in C., M. & St. P. waybills, of which the foregoing is a true blank form as the same were introduced in evidence and made exhibits;

Chicago, Milwaukee & St. Paul R'y.

Car St. Paul # 43080 10/18, 1894. W. B. # 108.
Rock Island, R. I. & P. R'y.
Freight forwarded from Lime Springs, Iowa, to East St. Louis.
Teichman Com. Co. 40,000 # 145 $48.00
St. Louis, Mo. Bulk barley.
Weight — Coleman.

Chicago, Milwaukee & St. Paul R'y.

Car St. Paul # 32194 Oct. 15, 1894. W. B. # 94.
Via Rock Island and R. I. & P. R'y.
Freight forwarded from Lime Springs, Iowa, to East St. Louis, Ills.
Teichman Com. Co.
St. Louis, Mo. 40,000 # 145 $58.00
Bulk barley.
Weigh — Coleman.

Chicago, Milwaukee & St. Paul R'y.

Car St. Paul # 34574 Oct. 15, 1894 W. B. # 91.
Via Rock Island R. I. & P. R'y.
Freight forwarded from Lime Springs, Iowa, to East St. Louis, Ills.
Teichman Com. Co.
St. Louis, Mo. Bulk barley 40,000 # 145 $58.00
Weigh at Coleman.

175 EXHIBIT "T."

Station Receipt.

Blank form of the Railway Terminal Association. Testimony. Witness Felps.

EXHIBIT "U."

Terminal Railroad Receipt.

Terminal Railroad Association of St. Louis.

46386
C., M. & St. P. From C., P. & St. L. to Eads, Oct. 20, 1894.
Prairie du Chien.
9/20 Teichman Com. Co.
St. Louis. Barley 56,650
16 and Union depot.

EXHIBIT "V."

Terminal Railroad Receipt.

Terminal Railroad Association of St. Louis.

4904
St. P. From C., P. & St. L. to Eads. Oct. 1, 1894.
Red Wing.
9/14 Teichman Com. Co.
16 W. yd. St. Louis. Barley 30,650 # $52/10
A 753 J. S. E. L. Pays.

EXHIBIT "W."

Notice to Receiver to Produce before the Master in Chancery Statements of W. H. Calvert.

In the Circuit Court of the United States in and for the Southern District of Illinois.

THE MERCANTILE TRUST COMPANY OF NEW York, Complainant,
vs.
CHICAGO, PEORIA & ST. LOUIS RAILROAD Company, Defendant. } Consolidated Cause.

In the matter of the intervening petitions of the Carr, Ryder and Engler Company, Chicago, Milwaukee & St. Paul Railway Company, the S. Y. Hyde Elevator Company, the W. W. Cargill Company, Jacob Rau; James N. Gilchrist and Colin F. Bell, partners under the firm name of Gilchrist & Company; the Hunting Elevator Company, and Thomas McMichael and William McMichael, under the firm name of McMichael & Son, and Henry Rippe.

You are hereby notified to have and to produce upon the hearing in the above-entitled matters before Stuart Brown, master in chancery, a certain affidavit made by W. H. Calvert, as local
176 agent of the C., P. & St. L. Railway Company, at East St. Louis, in the matter of the loss and damage to certain cars and their contents at East St. Louis, during the night of October 28, 1894, together with a statement of such cars and their contents, showing the market value of freight cars, etc., which statement is attached to said affidavit, and that in default of your having produced the original of said affidavit and statement parol testimony will be given of the contents of the same upon this hearing, and the copy thereof produced thereupon.

Yours, &c.,

BURTON HANSON.
GEO. P. CARY.

Sept. 3d, 1895.

To Maj. Bluford Wilson, att'y for the C., P. & St. L. R'y Co., and C. H. Bosworth, its receiver.

Received Sept. 3, 1895.

BLUFORD WILSON.

DECEMBER —, 1894.

STATE OF MISSOURI, } ss:
County of St. Louis, }

I, W. H. Calvert, local agent of the Chicago, Peoria and St. Louis Railway Company at East St. Louis, State of Illinois, being duly sworn according to law, depose and say that during the night of Oc-

tober 28, 1894, a fire occurred on the tracks of the Terminal Railway Association Co. at East St. Louis, State of Illinois (said tracks being used by the Chicago, Peoria and St. Louis Railway Company), and burned the cars, and wholly consumed the property freight in transit in said cars, as set forth in statements attached hereto, and forming a part of this proof of loss. Said deponent further deposes and says that the fire originated in freight warehouse of the Terminal Railway Association, and was accidental, and did not originate by any act, design or procurement on the part of the Chicago, Peoria and St. Louis Railway Company, or in consequence of any fraud or evil practice suffered by said railway company, and that every effort was made on the part of the employés of said railway company and others to extinguish the fire and save the property.

DECEMBER —, 1894.

STATE OF MISSOURI, }
County of St. Louis, } *ss:*

Before the undersigned authority personally appeared W. H. Calvert, who, being duly sworn, says that the attached statement is a true and correct statement of the damage of property while in transit on the Chicago, Peoria and St. Louis railway on the 28th day of October, 1894.

—— ——.

Subscribed and sworn to before me at my office in ——, this the — day of December, 1894.

—— ——.

177 *Statement of Cars and Their Contents Burned at East St. Louis During the Night of October 28, 1894, and the Market Value of Freight in said Cars at the Time they were Burned.*

Car.	No.	Clm.	Claimant.	Barley.	Bu.	Rate.	Value.	Total.
C., M. & St. P.	12	2962	Huntting Ele. Co	30,700	639.28	54	$355.38	
" "	11838	2963	McGregor, Ia	31,900	664.28	56	372.17	
" "	33090	2963	" "	41,400	862.24	56	483.00	
" "	34574	2964	" "	40,000	833.16	56	466.67	
" "	32194	2964	" "	40,000	833.16	56	466.67	
" "	43080	2964	" "	40,000	833.16	56	466.67	$2,600.56
C., M. & St. P.	680	2970	Hyde Ele. Co	30,555	636.27	56	356.47	
S. T. B. S. I.	20975	2970	La Crosse, Wis	40,000	833.16	55½	462.50	
C., B. & Q.	10814	2970	" "	30,000	625	"	346.88	
C., B. & Q.	1919	2970	" "	30,000	625	"	346.88	
C., B. & Q.	11962	2970	" "	30,000	625	"	346.87	
C., B. & Q.	14385	2970	" "	30,000	625	"	346.87	2,206.47
197								
C., M. & St. P.	6364	2973	Bosch-Ryan	30,000	625	56½	353.13	
C., M. & St. P.	12886	2973	Grain Co	30,050	626.02	56"	353.71	
C., M. & St. P.	2430	2973	Davenport, Ia	30,100	627.04	54"	471.76	
C., M. & St. P.	33134	2973	" "	36,330	756.42	"	412.50	
C., M. & St. P.	46992	2973	" "	50,470	1,051.22	56½	594.07	
C., M. & St. P.	31204	2973	" "	44,380	724.28	"	522.39	
C., M. & St. P.	31098	2973	" "	30,000	625	54"	340.62	
C., M. & St. P.	15944	2973	" "	44,550	926.02	56"	543.55	3,591.72
178 C., M. & St. P.	38108	2965	Gilchrist & Co	40,000	833.16	55"	462.50	
M. & N.	1154	2965	McGregor, Ia.	40,000	833.16	"	462.50	925
C., M. & St. P.	20022	2967	Cargill & Co	41,100	856.12	53½	458.10	
C., M. & St. P.	1100	2967	La Crosse, Wis	30,000	625	"	346.88	
C., M. & St. P.	32986	2967	" "	40,400	841.32	"	450.25	1,255.23
C., M. & St. P.	2598	2966	McMichael & Son	30,150	628.06	58	364.31	
C., M. & St. P.	37506	2966	McGregor, Ia.	34,440	717.24	58	416.15	

Statement of Cars Burned, etc.—Continued.

Car.	No.	Clm.	Claimant.	Barley.	Bu.	Rate.	Value.	Total.
C., M. & St. P.	12336	2966	McGregor, Ia.	28,180	587.04	58	340.51	
C., M. & St. P.	4126	2966	" "	28,110	585.30	58	339.66	
C., M. & St. P.	3728	2966	" "	30,020	625.20	58	362.74	
C., M. & St. P.	18126	2966	" "	35,280	735	58	426.30	
C., M. & St. P.	10720	2966	" "	27,000	583.16	58	338.33	
C., M. & St. P.	6842	2966	" "	30,270	530.30	58	365.76	
C., M. & St. P.	17272	2961	L. Lemke & Co.	40,650	846.42	53	448.84	$2,953.76
C., M. & St. P.	3218	2961	St. Louis, Mo.	29,710	618.46	59	365.19	
C., M. & St. P.	10536	2961	" "	30,480	635	59	374.65	
C., M. & St. P.	34908	2961	" "	41,919	873.15	59	515.26	
U. L.	10071	2961	" "	30,630	638.06	59	376.49	
M. & N.	1232	2961	" "	50,400	1,050	53	556.50	
C., M. & St. P.	16502	2961	" "	32,800	683.16	56	382.60	
B. C., R. & N.	8644	2974	Rothchild Gr'n.	50,070	1,043.06	54½	568.51	3,019.53
B. C., R. & N.	4044	2974	Co. Davenport	31,570	657.34	53"	351.87	
B. C., R. & N.	8910	2974	Iowa	50,000	1,041.32	54"	567.71	
179 C., M. & St. P.	46064	2969	Jacob Rau	62,350	1,298.46	57"	746.80	1,488.09
C., M. & St. P.	43222	2969	Wykoff, Minn.	48,960	1,020	57"	586.50	
C., N. O. & T. P.	3433	2972	Orthwein Gr.	55,200	1,150	56	644	1,333.30
C. C. C. & St. L.	12611	2972	Co. St. Louis	52,600	1,095.40	56	613.66	
St. L. B. S. I.	20983	2987	John Wahl	45,430	946 22	57	539.48	1,257.66
R. I. & P.	577	2987	Coms. Co.	43,890	914.18	57	521.19	
Mo. Pac.	12974	2987	St. Louis, Mo.	42,440	884.08	57	503.98	
								1,561.65
			Total value of barley burned					$22,195.98

Car.	No.	Clm.	Claimant.	Oats.	Bu.	Rate.	Value.	Total.
M. P.	13228	2984	Gratiot St.	37,000	1,156.08	32"	375.78	
C., N. O. & T. P.	518	2984	W. House Co.	35,100	1,096.28	32"	356.48	
H., C. A. & N.	180	2984	St. Louis, Mo.	47,450	1,482.26	32"	481.91	
N. C. & St. L.	893	2984	"	46,000	1,437.16	32"	467.19	
St. L. S. W.	8278	2984	"	32,100	1,003.04	32"	326.02	
St. L. B. S. I.	20487	2984	"	41,700	1,303.04	32"	423.51	
C. & E. I.	3780	2984	"	41,400	1,293.24	32"	420.47	
			Total value of oats burned					$2,851.36

Car.	No.	Clm.	Claimant.	H. coal.	Tons.	Rate.	Value.	Total.
P., F. W. & C.	5560	2968	West. Anth.	63,500	31.150	5.13	162.90	
Pa. R. R.	3974	2968	Coal Co.	60,816	30.816	5.13	156.02	
Pa. R. R.	794	2968	St. Louis, Mo.	60,144	30.144	5.13	154.27	
C. & P.	422	2968	"	60,816	30.816	5.13	156.01	$629.20
W. L.	26372	2985	Donwld. & Co.	28,800	14.800	5.60	80.64	$80.64

Statement of Cars Burned, etc.—Continued.

Car.	No.	Clm.	Claimant.	Barley.	Bu.	Rate.	Value.	Total.
180 U. L.	11893	..... A	Boehmer C. Co.	59,696	29.1696	5.60	167.15	$167.15
C., M. & St. P.	3524 A	.....	A. Cos. & Matl. 4 sets switch-rails credit by 1000 # scrap				30.00 2.68	$27.32
St. L., C. & P.	23258	A	Empty.					
B., P. & E.	704	A	Empty.					
C., P. & St. L.	1092	A	Empty.					
C., P. & St. L.	1953	A	Empty.					
C., P. & St. L.	4199	.....	Empty.					

Merchandise Outbound as per Bills.

C., P. & St. L.	4020	2975	Louis Mfg. Co.				$42.55	
		2976	Hampton & Co.				85.33	
		2977	Hampton & Co.				33.15	
		2978	Waldeck Provi. Co.				237.37	
		2979	Huttig Sash & Door Co.				14.49	
		2980	Baer, Seasongood & Co.				262.41	
		2981	Drew Glass Co.				1.25	
		2982	Smith & Davis Mfg. Co.				12.00	
		2983	Kingman & Co.				50.00	
		2988	Landaner & Sons				1.75	
			Tuxhorn Bros.				28.00	
			C. L. Gray				5.00	773.30
			Total value of freight burned					$26,724.95

181 Statement of cars burned at East St. Louis, Illinois, during the night of October 28, 1894, showing the value of each car, less depreciation for age, the salvage, and the net loss sustained by each car.

Initials.	Numbers.	Value.	Depreciation.	Salvage.	Net loss.
C., M. & St. P	3218	440.00	264.00	60.62	115.38
" "	3524	440.00	264.00	63.25	112.75
" "	4126	440.00	264.00	60.62	115.38
" "	6364	440.00	264.00	63.25	112.75
" "	3728	440.00	264.00	63.25	112.75
" "	6842	440.00	264.00	63.25	112.75
M. & N	1154	500.00	155.06	69.98	274.96
"	1232	500.00	155.06	69.98	274.96
C., M. & St. P	37506	475.00	158.78	69.98	246.24
" "	1100	440.00	264.00	63.25	112.75
" "	2430	440.00	264.00	60.62	115.38
" "	4598	440.00	264.00	63.25	112.75
" "	680	440.00	264.00	63.25	112.75
" "	12	440.00	264.00	63.25	112.75
" "	10536	440.00	259.60	60.62	119.78
" "	10720	440.00	259.60	60.62	119.78
" "	10071	440.00	261.45	60.62	117.93
" "	11836	440.00	255.90	63.25	120.85
" "	12886	440.00	254.97	63.25	121.78
" "	12336	440.00	257.75	60.62	121.63
" "	15944	475.00	274.19	69.98	130.83
" "	16502	440.00	253.99	63.25	122.76
" "	17272	475.00	266.74	69.98	138.28
" "	18126	475.00	266.74	69.98	138.28
" "	20022	515.00	268.86	69.98	176.16
" "	31098	475.00	236.90	69.98	168.12
" "	31204	515.00	235.75	69.98	209.32
" "	32194	475.00	234.50	69.98	170.52
" "	32986	475.00	234.50	69.98	170.52
" "	33090	475.00	195.58	69.98	209.44
" "	33134	475.00	195.58	69.98	209.44
" "	34908	475.00	192.69	69.98	212.33
" "	34574	475 00	194.14	69.98	210.88
" "	38108	475.00	252.32	69.98	192.70
" "	43080	500.00	109.63	85.73	344.64
" "	43222	500.00	109.63	85.73	344.64
" "	46064	500.00	105.47	85 73	348.80
182					
" "	46992	500.00	90.94	85.73	363.33
C., B. & Q	1919	490.00	280.63	65.93	143.44
" "	10814	490.00	294.00	65.93	130.07
" "	11962	490.00	246.87	69.98	173.15
" "	14385	490.00	255.63	69.98	164.39
B., C. R. & N	4044	440.00	244.15	61.85	174.00
" "	8644	500.00	84.70	70.45	384.85
" "	8910	500.00	84.70	70.45	384.85
Mo. Pacific	180	525.00	123.30	77.63	324.07
" "	12974	525.00	176.37	86.78	261.85
" "	13228	525.00	117.17	86.78	321.05
C., C. C. & St. L	26372	440.00	264.00	57.42	118.58
" "	12611	575.00	144.03	76.65	354.32
C. & E. I	3780	475.00	197.03	65.55	212.42
C., N. O. & T. P	518	475.00	147.32	63.27	264.41
" "	3433	575.00	39.91	92.19	482.90
St. L., C. & St. P	23258	500.00	300.	60.94	139.06
N. C. & St. L	893	525.00	48.77	89.63	386.60

Statement of Cars Burned, etc.—Continued.

Initials.	Numbers.	Value.	Depreciation.	Salvage.	Net loss.
St. L. S. W.....	8278	500.00	185.49	60.94	253.57
St. L. B. & S. I.....	20975	500.00	93.02	63.27	343.71
" "	20487	500.00	82.50	63.27	354.23
" "	20983	500.00	93.02	63.27	343.71
R. I. & P.....	577	500.00	213.50	65.51	220.99
Penn. R. R.....	3984	266.62	.....	59.45	207.17

SPRINGFIELD, ILLS., *Aug.* 31, 1895.

Mr. H. S. Rearden, sup't C., P. & St. L. R'y, Springfield, Ills.

DEAR SIR: I beg to acknowledge receipt of your favor of the 30th inst. requesting Conductor Keemer to report to your general claim agent, Mr. A. M. Gregory, Tuesday morning, September 3d at 9 o'clock, for the purpose of making a statement relative to a number of cars destroyed by fire recently in St. Louis.

I have requested our chief dispatcher, Brandenburg, to have Mr. Keemer on hand at the place designated.

Yours truly,

I. W. FOWLER,
Gen'l Sup't.

W.

EXHIBIT "1."

Letter from Burton Hanson to Bluford Wilson.

CHICAGO, *March 22d*, 1895.

Mr. Bluford Wilson, general solicitor C., P. & St. L. R'y, Springfield, Ill.

DEAR SIR: I have your favor of the 21st inst. in reference
183 to the barley claims arising out of the East St. Louis fire, and am much obliged to you for the same. I note what you say in reference to Judge Allen's absence until about the 10th of April. Will you kindly advise me what action has been taken toward bringing in the Terminal Association and making it a party? Has any order or rule been entered upon that company? So long as the matter is to be postponed until about the middle of April, I would like very well, if it could be done, to get that association in court so that the court will have before it all parties who have an interest. Can you bring this about by that time?

Hoping to hear from you, I am,

Yours very truly,

BURTON HANSON,
Ass't Gen. Solicitor.

Answered that judge left so suddenly I had not time to have rule entered.

EXHIBIT "2."

Letter from Burton Hanson to Bluford Wilson.

CHICAGO, ILL., *May* 10, 1895.

Mr. Philip B. Warren, ass't gen. sol'r C., P. & St. L. R'y, Springfield, Ills.

DEAR SIR: I have just had a conference with Major Wilson in reference to the intervening petitions of W. W. Cargill Company and others filed in the receivership proceedings of your company, claiming damages on account of the destruction by fire of a quantity of barley at East St. Louis in October last.

The major requested that I should write you to file petitions in each one of the intervening petitions, including the one of this company, for cars destroyed at once, and have a rule entered requiring the Terminal Railroad Association to show cause a week from Monday next, the 20th, why it should not be made a party defendant to such proceedings.

Judge Allen will be at Springfield on Monday forenoon, the 20th, and will hear the matter. I hope you will give this matter your immediate attention, as all parties are anxious to have these petitions disposed of before the summer vacation. As soon as the Terminal Association is made a party, we can proceed to a hearing at most any time.

Will you please advise me what you have done in this matter.

Yours truly, BURTON HANSON.

184 On Tuesday, September 3d, at ten o'clock a. m., before Stuart Brown, master in chancery of the United States court for the southern district of Illinois, in the consolidated cause of The Mercantile Trust Company and others against The Chicago, Peoria and St. Louis Railway and others, now pending in said court, and in the matter of the interventions in said cause by the Chicago, Milwaukee and St. Paul railway and others, the parties reappeared, the intervenors represented by Messrs. Burton Hanson and George P. Carey and the receiver by Messrs. Bluford Wilson and P. B. Warren, when, after the introduction of some further testimony on behalf of said intervenor (reported elsewhere and including Exhibits One and Two, introduced during a cross-examination by counsel for receiver) testimony was taken and proceedings had on the part of the receiver as follows, signatures waived by consent, Volney Hickox acting as stenographer:

Mr. WILSON: I understand your honor to rule that the hearing shall proceed in spite of the objections and exceptions taken on the part of the receiver.

The MASTER: Yes, sir.

Mr. WILSON: Will you please note that at this stage Mr. Wilson, on behalf of the receivers, objected to the proceedings for the same reasons that were assigned at the opening of this morning's session.

The MASTER: You can add further that it was under compulsion you proceeded.

Mr. WILSON: And under compulsion by the master's ruling.

Testimony of Mark Shawhan.

MARK SHAWHAN, sworn:

Direct by Mr. WILSON:

Q. I wish the record now to show an inquiry by me as to the presence of Mr. J. B. Malone, and I find him absent; (to the witness), Where do you reside?

A. St. Louis.

Q. What business are you engaged in?

A. Railroading.

Q. In the service of what company?

A. Terminal Railroad Association.

Q. That is the Terminal Company that operated the terminal railway at East St. Louis across the Eads bridge and the Merchants' bridge?

A. Yes, sir.

185 Q. Were you in the service of that company on the night of October 28, 1894?

A. Yes, sir.

Q. In what capacity?

A. Yardmaster.

Q. I will ask you to state your exact duties at that time, if you please, and your exact official relation to the Terminal railroad.

A. My duties when I first start in in the evening are to assign the men to work—different parts of the yard—different engines, and throughout the night I am supposed to give orders for whatever is necessary to be done.

Q. Do you have any particular designation as to your official employment there?

A. How is that?

Q. Did you have any particular official designation at that time; were you yardmaster in full or were you assistant or night yardmaster or day yardmaster?

A. I was night yardmaster at that time.

Q. You remember the fire?

A. Distinctly; yes, sir.

Q. About what time did the fire occur?

A. About ten fifty I think, in the evening.

Q. Were you present at that fire?

A. Yes, sir.

Q. What had you been engaged in doing prior to the fire, between the time you went on duty as night yardmaster and the beginning of the fire?

A. I had been directing the men, switching, or whatever I wanted done in certain parts of the yard.

Q. Were you engaged in that employment actively up to the time the fire broke out?

A. I may say the engine was lying idle about fifteen or twenty minutes before the fire broke out.

Q. What engine?

A. Had a crew working at the south end of the yard; Sunday night is supposed to be an easy night; don't do as much work Sunday night as other nights.

Q. Whose engine was this?

A. The Terminal Association's.

Q. In whose charge was it?

A. In my charge you might say.

Q. Were you running the engine?

A. No, sir; I couldn't tell you who the engineer was now.

Q. Remember who the fireman was?

186 A. No, sir.

Q. This engine you refer to was in the south part of the yard?

A. Yes, sir.

Q. About *or* far from the freight-transfer house?

A. I should say about two hundred and fifty yards.

Q. Had you been moving up and down the tracks?

A. Been down on the south side of the house.

Q. Were there any other engines in use?

A. Had two, west bound and east bound, at the stock yards, a quarter of a mile from the fire.

Q. Had they been in?

A. No, sir.

Q. I mean had not been on the tracks going in there?

A. I understand you; no, sir; had not been in there.

Q. How soon after the fire was your attention called to it?

A. I think I seen it about the first one.

Q. In what part of the building?

A. Southeast corner.

Q. What was the building stored with?

A. Hay, I think, mostly.

Q. Was there any other engine in use at that time prior to the fire?

A. No, I say the east-bound and west-bound engines—they were at the extreme—don't know what you might call it—east part of the yard; yard in a kind of triangle; we call it north and south, however, when we go to get anything; stock yards a quarter of a mile away from the fire.

Q. I believe it is a fact that two tracks run through this freight-house?

A. Yes, sir.

Q. Numbers of the tracks?

A. Forty-two and forty-three.

Q. I will ask you to state whether the doors in the freight-house were closed—all apertures.

A. As far as I know, except the ends; no door in the end.

Q. Anything to shut the hay off—contents of the depot from outside exposure?

A. There was on the west and east sides; not on the north and south sides.

Q. What was there in the house besides hay?

A. Nothing but the cars.

Q. Who was using the transfer-house at that time?

A. I couldn't tell you.

Q. Who did the hay belong to?

A. Don't know.

187 Q. Whose cars were in on these two tracks?

A. Chicago, Peoria and St. Louis, I think, mostly, so far as I know.

Q. Who set them there?

A. The Terminal Association.

Cross-examination by Mr. HANSON:

Q. How long had this been used for storing hay prior to the 28th?

A. I can't tell you; I couldn't tell when they commenced to use it for that purpose.

Q. Know it was stored with hay at the time of the fire?

A. Yes, sir.

Q. How near to this warehouse had your engine been that night?

A. Well, it had been right within seventy-five feet of it on the east side; very strong wind from the west side that night.

Q. Had not passed through the freight-house?

A. No, sir.

Q. How frequently would the engine be about this house?

A. Sunday night very seldom.

Q. This the only time you went near it that night?

A. Yes, sir.

Q. How about other nights?

A. Other nights would go in the house and pull cars out.

Q. Go in the warehouse?

A. With enough cars to couple on; wouldn't dare to go in there with the engine.

Q. Do you know what business you were doing in that neighborhood on the night of the fire when you were within seventy-five feet of it?

A. Shifting cars from one track to the other.

Q. Whose cars were they; any of these C., P. & St. L. cars?

A. No, don't think they had hold of any of those on the east side of the house.

Q. Did you go in there that night at any time to handle any of the C., P. & St. L. cars?

A. Made up two trains that night north side of the house.

Q. What time?

A. Nine and a half o'clock I think got through.

Q. Working for the C., P. & St. L.?
A. They were not in the house—the cars.
Q. How near were they?
A. On the west side of the house.
188 Q. How near to it?
A. I couldn't say.
Q. About how near were some of them?
A. That I can't say, either; might have got cars next to the house, north end of it.
Q. That was half past nine?
A. Yes, sir; my orders, when they got through with the train; come right up——
Q. Cars of the C., P. & St. L. mostly stored about this warehouse, weren't they, and on the tracks through the warehouse?
A. Five or six tracks supposed to be.
Q. These cars which were destroyed were by that warehouse?
A. Close to it; some inside and some outside.
Q. Fire at ten thirty?
A. Ten fifty, I think; didn't look at the minute.
Q. When first discovered?
A. Yes, sir.
Q. Other than Sunday nights the switch-engine did quite a deal of switching about the house?
A. Yes, sir; did more other nights than Sunday.
Q. How many engines would be working about the warehouse in the course of the night or day?
A. One each side, you might say.
Q. Made up two trains Sunday night for the C., P. & St. L. and got through at half past nine?
A. Yes, sir.
Q. Week day nights would do more work than Sunday night?
A. Yes, sir.
Q. Engines each side of the warehouse?
A. Yes, sir; kept one engine about there to do all the work for the C., P. & St. L., and our own engine switching on the other side.

Redirect by Mr. WILSON:

Q. If you know, I will ask you to state the origin of this fire.
A. I know nothing about it.

Testimony of David Lester.

DAVID LESTER sworn.

Direct by Mr. WILSON:

Q. Where are you employed?
A. Terminal Railroad Association, St. Louis.
Q. Where do your duties take you; what particular part of St. Louis or East St. Louis?
189 A. East St. Louis is all my work.
Q. What is your position; what are your duties?

A. I have charge of an engine there; foreman of an engine.

Q. In what particular part of East St. Louis did your duties require you to be on the night of October 28, 1894?

A. My work, north part of the yard; doing west-bound work.

Q. Were you employed in the yard of the Terminal Association at East St. Louis on the night of October 28th?

A. Yes, sir.

Q. What engine did you have?

A. Had engine 22, belonging to the Terminal Association.

Q. What time did you go on duty, and what time did you leave?

A. Supposed to go to work at seven o'clock in the evening; quit six in the morning.

Q. What time did you leave there that night, prior to the fire?

A. Didn't leave there at all; there in the morning.

Q. Did you observe the fire when it broke out?

A. Yes, sir.

Q. What time?

A. Had just broke through when I discovered it.

Q. Where were you located?

A. Quarter of a mile from the freight-house, on the west-bound lead.

Q. West of the station?

A. No, east of the freight-house.

Q. In what part of the building did the fire originate, speaking of the points of compass?

A. Well, it was near the southeast corner, I should think, something near that.

Q. What particular duties had you been engaged in that night prior to the fire?

A. Switching cars.

Q. On what tracks?

A. My tracks run but from one to sixteen.

Q. Which side of the depot is that?

A. East side.

Q. Were you west of the depot at all prior to the fire?

A. No, sir.

Q. Did you do all the work done there that night?

A. West-bound.

Q. Did your engine do all the work?

A. No, sir.

Q. What other engines were there on the ground?

190 A. I couldn't give you the number of the engine.

Q. Where——

A. Three crews at work that night.

Q. Where were they?

A. One doing east-bound, and the other doing work in the jack portion of the yard.

Q. What tracks covered by these engines?

A. I can give you east and west bound; they ran from one to thirty-nine.

—. What engine made up the C., P. & St. L. trains?

A. I couldn't tell you; they were Terminal engines, but I couldn't tell what ones.
Q. Which side did they work?
A. At the time of the fire?
Q. Yes, sir.
A. I couldn't say.
Q. Did you have occasion to run your engine into this freight warehouse any time during the day?
A. I didn't.
Q. Know what was stored there?
A. No, sir; I couldn't say exactly; there was hay in there.
Q. There was hay in there?
A. Yes, sir: and coal and barley.
Q. Know whose cars?
A. No, sir.

Cross-examination by Mr. HANSON:

Q. How long had you noticed that hay had been stored there?
A. I couldn't say.
Q. You had noticed it before the fire?
A. Yes, sir.
Q. On more than one occasion had you noticed?
A. I couldn't say; didn't pay much attention.
Q. Working there nights?
A. I was at that time; working days now.
Q. Had you been working days within a month prior to the night of the twenty-eighth?
A. No, sir.

Redirect by Mr. WILSON:

Q. If you know, please state to the master the origin of the fire.
A. I don't.

191 *Testimony of E. R. Stapleton.*

E. R. STAPLETON sworn.

Direct by Mr. WILSON:

Q. I will ask you to state what your employment was on the night of October 28, 1894; in the service of what company?
A. Service of the C., P. & St. L. railway, or of Mr. Bosworth, receiver, directly, in Mr. Calvert's office, the agent, as his chief clerk.
Q. At what point?
A. East St. Louis.
Q. I will ask you if you remember the fire of October 28th.
A. Distantly.
Q. How long after the fire was started was your attention called to it?
A. I was on the ground at the transfer-house within ten or twelve minutes after it originated.

Q. In speaking of the transfer-house, what house do you refer to?
A. The house that was burned.
Q. Whose was it?
A. I couldn't state positively, but it was generally supposed to be the property of the Terminal Association.
Q. In whose use and service?
A. As to that I couldn't say positively of my own knowledge.
Q. What was stored in it?
A. Hay.
Q. I will ask you to tell the master what the condition of the house was, whether closed or open, whether good condition or bad.
A. Having worked there at the time it was used for the transfer station, I was thoroughly familiar with the house. There are two tracks that run through the house, north and south, and there is a door at each end that is high and wide enough to clear the engine and cars on both tracks at the same time. Possibly the doors are twenty feet high and also that wide. They were wide open. Never saw any doors there; then, on the side, both sides of that house, there were doors on the outside, just the same as along the side of a room—they were doors that pulled up and down, and you could throw the whole side of the house wide open, except a little post, a foot wide, between these doors, which were ten feet wide, possibly; that is, not speaking positively as to the width of the doors. These doors would be raised up and down, and they were loose at the sides, to admit of their being easily raised.

192 Q. I will ask you whether the apertures during the night, at the ends and on the east and west sides of this building were so closed as to prevent sparks from the engine from communicating.
A. No, sir; they were not.
Q. How long was this house?
A. Of my own knowledge, I don't know; but I have heard that it was 600 feet.
Q. Judging from your observation, how long would you say?
A. About 600 feet.
Q. In what part of the building seemed to be the place of the fire?
A. Southeast corner.
Q. To what extent had the fire spread when you first saw it?
A. When I first saw it, there was nothing but smoke. I was on my way to the office (?)—and when I looked up I saw nothing but smoke. And was close to it—knew it was in the portion of the yard in which the property of the company was stored, and I very naturally started to run. Don't suppose I ran more than 200 feet before I noticed the flames; and they appeared to go straight through the house like a draft through these wide doors.
Q. Was the wind blowing pretty hard at that time?
A. Wasn't blowing what you would call extremely hard; wind blowing from the west to the east.
Q. How would that strike the building, in respect to its ends or sides; would the wind blow upon the sides, or into the end?

A. Well, you see there were cars on both sides of the freight-house, and the wind blowing sort of diagonally across the house—more that way—the wind, of course, the house being protected by the cars, the wind wouldn't get a fair sweep right there, and would naturally suck through the house.

Q. How far from their freight or transfer house was it to the office of the company, freight office of the company?

A. Possibly a half a mile.

Q. I will ask you what you found at the transfer-house, and what engines, if any, were there, and what was going on when you got to the fire; and I will ask you also, to go on in that connection and state just what you did.

A. As soon as I reached the transfer-house, I started up on the east side, as the fire had started in that part of the house, and there is where it seemed to me the trouble was; and I started up the east side of the house. Of course I was in a great hurry, and I am unable to state positively the names of the men I met, but knew them from observation to be employés of the Terminal Association, switching at the time; and they had a Terminal Association engine.

193 Q. How many?

A. There was one at work at the time, but before I left the east side, another engine came up. I went to the engine closet there on the east side, immediately on getting there. They were occupied in pulling cars further out in the yard, those close to the transfer-house. Went to one of the men engaged with the engine and said, for goodness sake go to the ones closer to the house and pull from there, as there is where the immediate danger is; you can save these afterwards. He wanted to know who I was. I told him; he then told me to go to hell. I went on—saw it was useless to have further conversation with him, and I went up to another engine that had arrived at that time, but could get no satisfaction from them. I then went to the north end of the transfer-house. There were several cars standing just outside the house. By this time there was a great crowd—pushed several cars out by hand, north, after that was done went over on the west side. By that time the whole house was afire. Went over on the left side and Mr. Lester, who testified here, had pulled some cars out of the middle of the tracks west of the house; I seen if we could have an engine there, we could save lots more of that property; there was a car of glucose, and a car of sashes and doors; also a car of canned goods; our Glen Carbon merchandise car. I saw if we could get an engine we could possibly do something there. Saw there was no engine present, as the engine was working the other way, I suppose; I won't say, because I don't know.

Q. Except as you saw it at first?

A. Yes, sir; so I went over where the C., P. & St. L. had an engine on our engine tracks in the immediate vicinity, and said, Can we use that engine? He says Yes, sufficient steam now to start, and by the time I can get out it will be all right. Thought Mr. Keemer, present, conductor, if he could run into the yard we could take the

engine and move a lot of our cars. Started to get that engine out, but before we got it out they had run a cut of cars down on the "Y" and refused to let us out.

Q. Who were "they," and who was it refused to let you out with your engine; whose employés?

A. They were Terminal Association employés.

Q. Did you ask them to let you out?

A. Yes, sir; asked them to clear the way and let the engine out; they said would be more in the way than do good.

Q. Was that true?

A. No, sir.

Mr. HANSON: Positive, are you?

A. Yes, sir; positive. Employed five years there—Mr. Keemer conductor—there running into the yard, competent to pull out a few cars.

194 Q. I will ask you to look at this rough draft or memorandum and state whether or not that indicates the location of the transfer freight-house and the various tracks and the scene of the fire on the night of October 28th?

A. In a rough way, yes, sir,

Q. Who made it?

A. That drawing?

Q. Yes, sir.

A. I did.

Q. You stated you had been five years employed in and about that locality?

A. In and about that locality.

Q. Familiar with the location of tracks in the yard?

A. Yes, sir.

Q. And in reference to the freight-house?

A. Yes, sir; employed in the house for six months.

Q. I will ask you to append that drawing to your testimony; (marked "Exhibit 3"); this plat indicates the points of compass, north, east, west and south, does it?

A. Yes, sir.

Q. I will ask you to refer to this plat and tell the master on which one of these tracks you found the engine of the Terminal Association engaged in switching cars when you first went up.

A. About this track; not positive that track because there may be more tracks.

Q. How indicated?

A. By the red line.

Q. About how many tracks was that distant from the location of the fire?

A. I would judge about ten *blocks*.

Q. Away from the fire?

A. Yes, sir.

Q. I will ask you whether, when you asked the engineer in charge of the Terminal engine——

A. Wasn't the engineer.

Q. I will ask you, when you asked the employé of the Terminal

Association to cease pulling on tracks furthest from the house, if you meant the red line indicated on your plat?

A. Yes, sir.

Q. That was ten tracks away from the location of the fire?

A. About that.

Q. What tracks and what cars did you have reference to when you asked these employés to cease pulling there and work closer to the fire?

A. Tracks indicated by red lines.

195 Q. Next to the fire?

A. Yes, sir; next to the fire; these second and third tracks.

Q. Did the C., P. & St. L have any cars there?

A. Yes, sir.

Q. I will ask you where the bulk of the cars burned that night were located, speaking by your plat?

A. They were located on these tracks—these red lines off the plat, next to the house; in the house and first tracks west of the house.

Q. Of course the two tracks that ran through the house were in the house covered by six hundred feet of shed?

A. Yes, sir.

Q. How close were the tracks just outside, next west?

A. As close as they could be put.

Q. About how close?

A. I should judge three or four feet.

Q. I see you have a red line indicated on the west of your plat; were there any of the C., P. & St. L. located there?

A. Do you mean this dotted line?

Q. Yes, sir.

A. Yes; that was what we call our rib (?) track.

Q. I will ask you where most of the cars of the C., P. & St. L. were burned?

A. On the east (?) side.

Q. That was the side where you asked them to pull away?

A. Yes, sir.

Q. How many cars were burned on the west side of the house, if you can recollect?

A. I am unable to state, but I would judge ten or fifteen.

Q. Were those cars near, or more remote—on the near, or more remote tracks?

A. Near tracks.

Q. Next to the house?

A. Yes, sir.

Q. Look at that plat, if you please, Mr. Stapleton, and locate the C., P. & St. L. engine which you have referred to.

A. Where I have marked the square.

Q. Marked the engine J. S. E.?

A. Yes, sir.

Q. How far was that engine from the fire?

A. About two hundred feet or two hundred and fifty.

Q. Who was in charge of it?

A. The hostler.

Q. What was his name?

A. I don't know; he is the man that handles the engines, gets water.

196 Q. After satisfying yourself that the engine was capable of moving, speaking by the plat, in what direction did you move it?

A. Didn't move it at all, because this track here was blocked, where I write blocked. This was a stub track; this end was not connected and the only way was to go this way, get on the "Y" and get down.

Q. Who closed it?

A. I can't say positive, but it was in the Terminal Association yard and no other engine was there except—I believe the Short Line engine did come up and the Merchants' Bridge engine.

Q. I will ask you under whose control the Merchants' bridge was?

A. Terminal Association.

Q. I will ask you if it is not a fact that the Terminal Association controlled not only the business over the Eads bridge but the Merchants' at the same time.

A. Generally supposed to.

Q. With whom did you communicate with reference to the business of the C., P. & St. L. over the Merchants' bridge, if you know?

A. Mr. J. M. Allison and Mr. Felps.

Q. Who were they?

A. Agents of the Terminal Association,

Q. You may state whether during the progress of the fire, after you got there, you met any Terminal Association employes, and if so, who?

A. A Mr. Lester and Mr. Shawhan.

Q. Anybody else?

A. Nobody I could call by name; several I knew by sight.

Mr. WARREN: Knew them to be employés of the Terminal Association?

A. Yes, sir.

Q. I will ask you if you know or have information from anybody that claimed to know as to the origin of the fire?

A. No, sir.

Q. Did you have any conversation with the Terminal Association people as to the origin of the fire?

A. We were talking—Mr. Shawhan and I were talking after the fire had pretty well died out, standing by Mr. Dunlop's office, or in the immediate vicinity, and I said to Mr. Shawhan, talking about making up number thirty due out there in the morning, the cars so badly scattered, caboose and so forth, talking about getting the train out—commenced talking about the origin of the fire; I asked if he knew what started it; he said he didn't. I said Must have been a spark from the engine; he said, No, didn't think it

197 was, for the engine hadn't been working about there for about thirty minutes.

Q. Did he state it had been working about there?

A. Stated just as I said; didn't think it was that because the engine had been laid up about thirty minutes, or something like that.

Q. What do you know of your own knowledge about the engine being in proximity of the freight-house?

A. Nothing whatever.

Q. Who does know?

A. Mr. Shawhan would be the man to know exactly.

Q. I will ask you, if I have not already done so, what was stored in the house at the time.

A. Largely hay.

Q. Much, or little?

A. Considerable of it.

Q. As to these two tracks running into the house, how high up would they come with reference to the height of the locomotive, taking the stack and all; how high did the hay in the warehouse compare with the height of the locomotive that might be on these two tracks?

A. I don't know that I could state that exactly, for the reason that I don't know the heights from the platform.

Q. As near as you can; don't ask you to state exactly.

A. Nearly the same height.

Q. Do you know whose hay this was?

A. No, sir.

Q. Hay for which the C., P. & St. L. was in any way responsible?

A. No, sir.

Q. Had it come in over the C., P. & St. L.?

A. Not that I know of.

Q. Did the C., P. & St. L. have any charge of this hay, any responsibility?

A. No, sir.

Q. Now as to the cars stored on the tracks, were there any other cars or property than that of the C., P. & St. L. upon the tracks next to the warehouse?

A. Yes, sir.

Q. How were the tracks used, exclusively for the business of the C., P. & St. L.?

A. No, no, never has been so.

Q. Who used them?

A. The Terminal Association used them; and we used them; in fact we have never had any rights.

198 Q. Did you have any control or direction as chief clerk in the office as to the particular place of deposit of cars brought in by the C., P. & St. L.?

A. No, sir.

Q. Did anybody in your office?

A. No, sir.

Q. Who managed as to the place of deposit?

A. The Terminal Association.

Q. Where did the Terminal Association take possession of these cars, speaking by the plat which you have made an exhibit to your evidence?

A. Our train always pulled in on the curved tracks at the north of the freight-house; there the engines were cut off and the Terminal Association engines took hold of the cars and stored them as they saw fit and where, and made deliveries as per bills.

Mr. HANSON: Waybills?

A. Yes, sir.

Q. Mr. Felps in his examination-in-chief, testified that from the time cars were deposited on these circular tracks north of the freight-house, the receiver had nothing to do with them.

Mr. HANSON: Don't know as he testified that way.

Q. At page seven in the transcript of the evidence of Mr. Felps, introduced by the petitioner, this memorandum occurs, and these questions and answers appear.

Q. Now when a train of the receiver comes into this yard from the north, where will it come to a stop in reference to any track on this map?

Objection.—Unless he testifies with some degree of care with reference to map, it will not be understood by the master or the court.

Q. I will designate the track.

A. The tracks known as the "Y's"—three "Y" tracks there; freight trains come in there and stop.

Q. Are those the tracks referred to on your plat, circular tracks north of the freight-house?

A. Yes, sir.

Q. Question again:

Q. Those "Y" tracks are the tracks which appear on this map as connecting—and on the map marked Terminal Association range yard—to the Wabash junction; they are just north——

A. North and west of the portion of the yard assigned to the C., P. & St. L.

Q. Is that correct?

A. Yes, sir.

Q. North and west of the tracks marked red?

199 A. Yes, sir.

Q. A train comes in on this "Y;" what is then done with it by the receiver, if anything?

A. The train stops on the "Y," and the receiver is done with them.

Q. Is that true?

A. Yes, sir.

Q. Now I ask you, having read from the testimony of Mr. Felps, if that statement is true, as to the deposit of the cars, and the actual handling of them.

A. The receiver does not handle the cars or control their handling in a direct way after that.

Q. Then do you or not agree with the statement of Mr. Felps,

that the receiver was done with the handling of the cars, so far as they are delivered at East St. Louis?

Mr. HANSON: Done with them? What? Done handling them?

Q. Answer.

A. Mr. Felps being agent of the Terminal Association and taking into consideration the relations that have always existed, that must be the fact.

Q. Does that accord with your observation as to the actual handling of the cars?

A. Yes, sir.

Q. You tried that night to direct the yardmaster as to the manner in which he should fight this fire?

A. Will not state it was the yardmaster. It was an employé of the Terminal Association, employed in a switching capacity.

Q. Did he accept your suggestion?

A. No, sir.

Q. Did any of them?

A. No, sir; Mr. Keemer and I saw the Merchants' Bridge engine in the place set apart to our engine, and the switchman was sitting down by his engine fast asleep. Mr. Keemer and I waked him up; we asked him to take hold, and he said he would when there was any danger; one of the cars was this car of glucose.

Q. As the result of your observations on the ground that night, of all you saw and all you did, and speaking of your experience as an employé in and about this yard for five years, I will ask you what in your judgment would have been the effect upon the loss suffered by the owners of the property that was burned, if your directions had been followed, and if you had been permitted to take the engines and have them used as you first desired to have them used.

200 Objection.—If that is material, it is for the court to pass upon and not the witness. Object to it.

Q. I will ask you to answer the question.

The MASTER: Of course, the materiality will be determined after all the evidence is in.

Mr. HANSON: I think the master is capable of determining that now, as well as after all the evidence is in.

The MASTER: It is simply asking for his opinion, if his instructions had been carried out, what would have been the effect of it.

(Objection not sustained; exception by intervenors)

Q. Answer.

A. In my judgment the loss would have been less.

Q. Materially less?

A. Yes, sir.

Q. The cars on which tracks, speaking by your plat, would have been saved that were burned?

(Objection for the same reason.)

The MASTER: Carrying it rather into detail.

Q. I am asking him to speak by the plat?

The MASTER: I have allowed him to answer.
(Objection not sustained; exception by intervenors.)

A. We could have saved some cars on the tracks west of the transfer-house, and more on the east of the transfer-house.

Q. What did those cars contain?

A. Contained barley and hard coal principally, and some empty cars.

Q. From the time you arrived upon the ground until the fire had done its work or so long as you remained, were you able to exercise any control or direction as to the manner in which the engines were handled?

A. I was not.

Q. Why?

A. Well, simply because my efforts in that direction were paid no attention to.

Q. Was the fire continuing the next morning?

A. Yes, sir, to a certain extent.

Q. You speak of coal; do you mean hard coal?

A. Yes, sir.

Q. I will ask you whether or not this coal, or any portion of it, could have been saved under your direction?

(Objection.—Asking for the opinion of the witness, on a matter not a subject of opinion. Immaterial.)

A. Owing to the fact that hard coal in quantities is extremely hard to take hold of the fire, there could have been a con-
201 siderable part of that hard coal saved, because the hard coal was not on fire yet the next morning.

(Objection.—No coal involved in this controversy at all.)

Q. Cars involved?

Cross-examination by Mr. HANSON:

Q. You say this warehouse had stored in it a considerable quantity of hay at the time of the fire?

A. Yes, sir.

Q. How long had that hay been stored there?

A. I couldn't say.

Q. How long had hay been stored there—not this particular hay, but any?

A. I couldn't say.

Q. About how long would you say?

A. I would hate to answer that question, because I have no definite knowledge on the subject. I know there was hay there that night, and I had seen hay previous to that.

Q. Do you know that this part of the warehouse had been leased to a hay company?

A. I don't.

Q. I think Major Wilson drew it out of one of the witnesses.

A. I understand, but don't know about it.

Q. Do you say this house was so constructed that sparks could easily fall on the hay and set it afire?

A. They could easily fall from the end doors, or at the sides from the looseness of the doors there. I should judge so, because the doors were loose and slid up and down, this way.

Q. How long did that state of things exist?

A. From the time it was built.

Q. How long before the fire?

A. I couldn't say.

Q. A year, or two or three years?

A. I don't know. I was employed in the transfer-house for six months, but this was quite a period of time after that.

Q. So it had existed in that condition a year?

A. I wouldn't say because I don't know.

Q. These tracks I understand, in the immediate vicinity of the warehouse, were not exclusively used by the C., P. & St. L. trains?

A. No, sir.

Q. But commonly, for setting cars in there?

A. Just as the Terminal Association saw fit—put our cars there if they saw fit.

202 Q. Wasn't it a common thing to store your cars there?

A. Generally speaking the cars were put there.

Q. And at the time of the fire the cars were mostly C., P. & St. L. cars, a good number of them?

A. A good number of them.

Q. They were there awaiting further transportation to St. Louis, most of them——

Mr. WILSON: Well, now——

Q. If you know.

A. Yes, sir; there awaiting orders from the owners.

Q. Any more cars of the C., P. & St. L., at that time than usual located on the tracks, I mean at the time of the fire?

A. No; no more than usual, I believe; about the usual number for the season of the year.

Q. One day with another?

A. Yes, sir.

Q. The C., P. & St. L., or the receiver, had no yard engine of their own?

A. No, sir.

Q. Only the engine that put the trains in there and that belonged to the Terminal Association, that handled your cars?

A. I suppose it belonged to the Terminal Association; as to the ownership of the engine I could not testify positively.

Q. So far as you know, it belonged to the association?

A. Yes, sir.

Q. Was this fire, when you got to it, in the hay?

A. It was clear through the house at the time I got to the building.

Q. What time was that, if you know?

A. It was in the neighborhood of eleven o'clock.

Q. The hay was then burning?

A. Went like a flash through the whole house.

Q. Were you employed there nights?

A. No, sir.

Q. You had been employed at this station under Mr. Calvert how long?

A. Never employed at that station under Mr. Calvert.

Q. Where were you at the time of the fire?

A. Mr. Calvert's chief clerk, but not at this station, because our office is half a mile away.

Q. I mean at East St. Louis?

A. Yes, sir; at East St. Louis; I was in his employ.

Q. How long had you been under Mr. Calvert at East St. Louis prior to the fire?

A. Going on three years.

203 Q. You had to do with the business there of these cars standing on these tracks, did you not?

A. Yes, sir.

Q. Did there several engines come up there, after the fire started, to assist in saving the property?

A. Yes, sir.

Q. From what direction?

A. The Cairo Short Line engine came up, and the Merchants' Bridge engine came down, and more bridge engines from across the river.

Q. How many engines of the Terminal Association?

A. I couldn't say exactly.

Q. Anybody in charge of this work, or taking care of this property, who would naturally be——

A. Mr. Shawhan that night.

Q. He was yardmaster?

A. Yes, sir.

Q. He was the proper person to take charge of the engine?

A. Yes, sir; being the highest official of the Terminal Association.

Q. You think if you had had the handling of the engine you could have saved more than he did?

A. Yes, sir.

Q. The Major asked if the receiver was done with them, so far as handling the cars?

A. So far as the handling of the cars.

Q. The receiver did have something else to do with them with reference to sending them on to St. Louis in the way of giving waybills?

A. Yes, sir; giving waybills.

Q. That was after they were on these "Y" tracks?

A. Yes, sir.

Q. Now, Mr. Felps testified also to this: "When that train is broken up as I have stated, and the cars set on the tracks marked red," that is, these tracks by this warehouse, "we are then done

with them;" that is the Terminal Association is done with them, "until we get waybills from the C., P. & St. L., or the receiver." Is that true?

A. Yes, sir.

Q. When those waybills are made out by the agent at East St. Louis they are delivered to the Terminal Association?

A. And their receipt taken.

Q. Of the waybill?

A. Yes, sir.

Q. So you would have the receipt of every waybill delivered?

204 A. Yes, sir.

Q. Then the Terminal Association would take these cars according to the directions on the waybill?

A. Yes, sir.

Redirect by Mr. WILSON:

Q. Do you mean to say the receiver had control of these cars, so far as placing them is concerned, or handling them?

A. So far as placing them or handling them, he did not.

Q. Now, I will ask you whether cars billed, say from Wykoff, wherever that may be, to East St. Louis, with a memorandum on the face of the waybill which stated the name of the consignee in St. Louis, whether the C., P. & St. L., when it delivered the cars at these yards in East St. Louis, had hauled them as far as they contracted to haul them.

(Objection.)

A. They had. The destination of St. Louis on the bill cuts no figure in the matter whatever; the cars are brought in there and held, and the consignee is served with a regular notice.

Q. Then it is the consignee directs?

A. The consignee directs where he wants them; a large portion go to Belleville or Highland or Hines' brewery—to different places.

Q. I will ask you whether or not the waybill as to barley shipped on which you had had the name of the consignee in St. Louis was conclusive as to the ultimate destination of the car?

A. The barley shipment? By no means whatever.

Q. What became of it after placing it on the "Y"?

A. It would be hard to answer that question, because it goes to a thousand different places.

Mr. HANSON: In St. Louis?

A. St. Louis and East St. Louis both; no general place.

Q. In this barley—any of the barley received from the C., M. & St. P. prior to the date of the fire, and about which he has offered some memorandum waybills and so forth shipped to other points—East St. Louis?

A. Prior to the fire?

Q. I speak of prior to the fire?

A. Oh, yes.

Q. Who controlled as to the precise and definite point where it should be delivered?

A. The consignee in all cases.

Q. Then I will ask you what the custom was as between the C., P. & St. L. and the Terminal Railroad Association as to the further direction and final destination of the cars.

205 A. The cars would come in and be placed on the tracks in the Terminal Association yard wherever they saw fit; we would take the waybill and notify the consignee that we had a car numbered so and so loaded with barley; "Where do you want it?" That is about the substance of the notice; and at such time as he got ready he would send this notice back, endorsed on the back a great many times, Send this car to Hines' brewery, or Send it to Highland, or some other point. Then we take and make out a waybill; take that to Mr. Felps and take his receipt.

Q. Was that a different and separate transaction, having reference to the original contract between the shipper and the C., M. & St. P.; was it a new arrangement the consignee directed and controlled, or was it the original arrangement named by the shipper?

A. A new arrangement by the consignee, who placed orders with us to hold his barley.

Cross-examination by Mr. HANSON:

Q. You were holding these cars awaiting the further order of transportation of the cars?

(Objection.—Misleading.)

Q. I ask if the company that gave this notice to the consignee, the C., P. & St. L., after this notice, would hold these for further transportation, and when they got further orders would transport according to the order or give directions—that is, when the car comes into East St. Louis, you notified the consignee?

A. Yes, sir.

Q. Then you would hold it until you got an order, and then you would make out a waybill, and deliver it to the Terminal Association according to the direction of the consignee to take them on.

(Objection.—Putting words in the witness' mouth.)

Q. I am asking—strike this all out.

Mr. WILSON: I object to it being struck out.

Q. Won't you state again just what you stated before, so I will understand it, with reference to the custom in respect to barley coming to East St. Louis, consigned to Teichman & Company, St. Louis?

A. With reference to Teichman's barley, we would sometimes have orders in our office, in advance of the arrival of the cars, what disposition to make of them; others we wouldn't. Those we didn't, when they came, we sent Mr. Teichman notice that the cars were there, what shall we do with them? Virtually that is the substance; and he would at his pleasure, advise us to send the car so

and so, to Hines' brewery, say. We would make out a waybill for the car, consign it that way, and deliver it to Felps.

206 Q. Mr. Felps of the Terminal Association?

A. Yes, sir.

Q. So until you received this notice back you would hold that car, awaiting transportation back across the river, if he ordered it?

A. While the car was being held there as to the relationship existing there I am not competent to say.

Q. Not asking for the relationship; if you held this car under those circumstances, awaiting the destination across the river—order?

A. Inasmuch as we had no engine there, and could not control where we put the car, we naturally could not hold it, because if Mr. Felps was so disposed, he could put it where he pleased.

Q. Could Mr. Felps deliver it without a waybill?

A. Not as a general thing.

Q. Would he in any instance?

A. I have known it to be done.

Q. But that is an exception?

A. Yes, sir.

Q. The general custom was, he would not undertake to move it until he got a waybill?

A. That is right.

Q. And you delivered the waybill when you got direction from the consignee, and just to the point he wanted?

A. Yes, sir.

Q. That car stood there awaiting that waybill?

A. Yes, sir; awaiting that waybill, and where Mr. Felps would put it.

Redirect by Mr. WILSON:

Q. As a rule, how much time elapsed between the time these cars were put on the "Y" until they were finally disposed of?

(Objection.—Time that usually elapsed not binding.)

The MASTER: He has as much right to show custom as you have.

A. The time that elapsed between the time the cars came and the time they were pulled away to their final destination; sometimes it would vary; might be two hours or two months.

Q. At whose convenience?

A. Consignee's.

Q. When you received directions from the consignee who were they for?

A. Then we made a waybill and delivered that to Mr. Felps.

Q. The Terminal man?

A. Yes, sir.

207 Q. Were there directions for anything else except for the guidance of the Terminal Association in the handling of the cars?

A. Only in this way; if a man would say, Send this to Highland, that would be instruction to the Vandalia.

Q. But who would handle it?
A. The Terminal Association.
Q. During all the time that elapsed between the receiving of the cars at East St. Louis and their being sent to the "Y's" of the Terminal Association, under whose care, custody and control were the cars?

(Objection to the word "care." He can use the word custody if he wants to.)
(Objection and exception.)

A. In my opinion, they were in the care, custody and control of the Terminal Association, for this reason—I wish to explain why that is my opinion.

(Objection.—Not answering a fact.)

Q. You stand by your answer, do you?
A. Yes, sir; and for this reason: we had no engine there, and could not move the cars if we wanted to, without their permission. Therefore, the cars under those circumstances must have been in their control, and we at times, would issue orders what to do with them, but those were acted on at their convenience, therefore, they must have controlled them.

Cross-examination by Mr. HANSON:

Q. You are aware that this business was done under an agreement between you and the Terminal Association?
A. I was aware there was an agreement at one time, but which had ceased to exist.
Q. Isn't it true that in every instance of these shipments of barley that you received your orders were given by the consignee, Mr. Teichman, to you, and not to the Terminal Association?
A. No, sir.
Q. Now, if the cars were standing there, as you stated, awaiting transportation over the river to some point the consignee might designate, and you gave this notice to the consignee, didn't that notice come back from the consignee to you?
A. No, sir.
Q. I am asking for the practice?
A. Ordinarily this didn't come back.
Q. I mean the reply to your notice.
A. He might write a letter; might write to Mr. Roederer.
Q. Might?
A. Did a great many times.
208 Q. Notice came from the consignee to you customarily?
A. Yes, sir.

Redirect by Mr. WILSON:

Q. Who was Mr. Roederer?
A. Joint agent of the Terminal Association——

Q. Was he at that time?
A. Yes, sir.
Q. These notices were given to Roederer?
A. Yes, sir.

Cross-examination by Mr. HANSON:

Q. Roederer would give them over to you?
A. Yes, sir.
Q. Now what do you think of your opinion as to who had control of the cars?
A. I think they had control of them.
Q. But had to get orders of you?
A. Before they could find out how much money to collect.

Adjourned to 2 o'clock p. m.

Mr. STAPLETON recalled.

Direct by Mr. WILSON:

Q. In your testimony you spoke of having been at one time employed in and about this freight-transfer house; were you employed there as a representative of the C., P. & St. L.?
A. No, sir; I was paid by the Terminal Association.
Q. How long ago was that prior to this testimony?
A. Don't know exactly.
Q. Was it before you went into the service of the C., P. & St. L.?
A. Yes, sir; couldn't have been after; about three years.
Q. Your acquaintance with it grew out of your employment with the Terminal Association and not with the C., P. & St. L.?
A. Yes, sir.

209 *Testimony of John Wiedmer.*

JOHN WIEDMER sworn.

Direct by Mr. WILSON:

Q. Where do you live?
A. St. Louis.
Q. In what business?
A. Grain merchant.
Q. What firm?
A. Gratiot Street Warehouse Company.
Q. How long have you been identified with that firm?
A. About eight or nine years.
Q. You were then engaged in that capacity in October, 1894?
A. Yes, sir.
Q. Where did you receive and handle your merchandise; at what point?
A. You mean just in relation to this case?
Q. Yes, sir.
A. Received grain in what is known as the East St. Louis Terminal warehouse; I think that is what the name of it is.

Q. Do you know in what part of East St. Louis that warehouse is located?

A. As much as I know, it was in the Terminal Railway yards.

Q. At East St. Louis?

A Yes, sir.

Q. What kind of merchandise did you handle during that month?

A. Through that house?

Q. Yes, sir.

A. Hay.

Q. Through whom did you arrange for the occupancy of the house?

A. J. L. Penny commercial agent of the St. Louis Terminal railway.

Q. How long did you occupy it?

A. Not very clear on the date, but it seems to me about two or three months.

Q. Beginning when and ending when?

A. Beginning some time in August and ending with the burning of the warehouse.

Q. Do you know what was in the warehouse the night it was burned, chiefly?

A. Hay.

Q. Who owned the hay?

210 A. We did.

Q. About how much hay was there in the warehouse?

A. About a hundred and twenty-five car-loads of hay; would not be positive without looking at the books.

Q. Did you occupy this warehouse, or did you in connection with the occupancy of it have any dealings directly or indirectly, as you knew, with Mr. C. H. Bosworth, the receiver of the Chicago, Peoria & St. Louis?

A. Never.

Q. Or with any of his employés?

A. Never.

Q. I will ask you why you ceased to use this house?

A. Burned down.

Q. Did you have any written contract or agreement about it?

A. No, sir; no written agreement.

Q. You may state to the master the circumstances under which you ceased to occupy the premises, and any conference or conversation you may have had with the representatives of the St. Louis Terminal Association, just prior to the time of the fire.

A. Well, the best way for me to tell that is just the way I got hold of it.

(Objection.—Incompetent, immaterial and irrelevant, any conversation that occurred between this witness and any other party. I suppose it will be overruled. Exception.)

A. We were receiving quite a lot of hay from the west that we were reshipping for the south during this season of the year, and there being a competition between the Terminal railway and the

Wiggins ferry, the Terminal railway, that is Mr. Penny, their agent, asked to secure our business. I knew of this warehouse being vacant, it having been occupied by Payne Brothers, before we secured this storehouse, and I mentioned to him, if he would give me the right to take our hay through there, I would give him the hay to go over the bridge. He agreed to this; he agreed at that time in consideration of us giving him the business, he would let us take and transfer and assort our hay through the warehouse. At the same time there was a matter between me and him, if I found out by handling it there was anything to be made out of it, I would take and try to lease the place.

Q. Was your attention called during the time of your experimental operation of the warehouse, your occupation of it, to the conditions under which your hay was stored, whether safe or otherwise, and if so, did you make any statement about it to the Terminal Association or anybody else?

A. Of course, when I handle anything like hay, I know it is apt to catch fire and I naturally insure it, and called Mr. Penny's
211 attention to whether it would injure the insurance; told him better talk it up with his company, because hay is easily caught fire.

Q. Did you do this on general principle or by reason of any particular facts?

A. My experience; I think it was I called attention to it, about their guarding themselves against fire.

Q. How did you come to call their attention to the necessity. Did you see the warehouse?

A. Yes, sir; went and examined it.

Q. Saw the method of business transacted by the use of the engine?

A. Saw they were running trains through there.

Q. Did you think it was safe?

A. Didn't think it was safe.

Q. On that ground you insured the property?

A. Yes, sir.

Q. Did you make any negotiations with the C., P. & St. L. as to the use of those tracks, handling your cars, shipping your freight?

A. No, sir.

Q. You didn't know the C., P. & St. L.?

A. Had no connection with them whatever.

Q. How long after did you take out this insurance?

A. The very first day after—after its being taken out of the cars I insured it.

Q. How was this hay used with reference to tracks running into or through the building and with reference to tracks on each side?

A. Platforms on each side; stored my hay on those platforms.

Q. About how far from the tracks would it be?

A. There was room enough to take and handle a couple of bales of hay between the hay and the cars.

Q. Very close?

A. I should judge within four or five feet of the cars.

Q. You say this hay came in from the west and was going south?
A. Yes, sir.
Q. Did it come over the C., P. & St. L.?
A. Might have received some over that road, but the bulk of it from the west.
Q. I will ask you if, during the time your hay was stored there, you saw the engine passing through these tracks or passing near the building?
212 A. Never saw an engine going through the building, but the track kept clear—pushing our cars through, and I surmised they were just as apt to take our cars and run them in there with an engine next to the cars as not.
Q. Did you use the outside tracks, also, as well as the tracks inside the building for loading and unloading?
A. Yes, sir; I think we loaded from one of the outside tracks; wouldn't be sure about that. Think we generally did it from the inside tracks.
Q. What is your impression?
A. My impression is, if I had occasion to use one of the side tracks, I would have done it.
Q. This commercial agent, Penny, did he tell you you could use the tracks outside the building if you wanted to?
A. My recollection is he told me I could load anywhere I wanted to around there; place it where I ordered it.
Q. Used the tracks inside or outside as suited your convenience?
A. I could have done so; don't know that I used the outside.

Cross-examination by Mr. HANSON:

Q. Then you regarded that warehouse stored with hay and so easily caught fire, located in connection with the tracks, as a source of great danger from fire?
A. I should judge so, because it was open——
Q. How long had you had hay stored there?
A. Some time in the latter part of August, about the time new hay begins to move.
Q. It was because you regarded it as a source of danger you saw the necessity of insurance, and insured it for protection?
A. As I said before, I always insure everything.
Q. You don't know how much hay you had there during the three months that — came over the C., P. & St. L. tracks?
A. I couldn't say; might have been a good deal; might have been none.

Redirect by Mr. WILSON:

Q. At the time you arranged with Penny, the commercial agent of the St. Louis Terminal Association, for the use of the warehouse, I will ask whether you were influenced at all by the fact that these tracks, or some of the tracks, were located outside and immediately adjacent to the building, and some inside, and you could have the use of any of them?

A. Yes, sir, that had an influence; because it would be very convenient to load either way.

213 Q. No question by Mr. Penny at the time of anybody else having a right to exclude you?

A. No, sir.

Q. You contracted with him on the understanding that he had full control of the transaction?

A. Yes, sir.

Testimony of B. D. Kane.

B. D. KANE sworn.

Direct by Mr. WILSON:

Q. What employment or business were you engaged in in October, 1894?

A. Car-repairing.

Q. In the service of what company?

A. C., P. & St. L.

Q. How long had you been engaged in that capacity?

A. About two months prior to the fire.

Q. Were you present in the yards of the St. Louis Terminal Association on the night of the fire?

A. Yes, sir.

Q. About what time did the fire start?

A. About ten fifty.

Q. How soon were you upon the ground after that?

A. About ten minutes later.

Q. About eleven o'clock?

A. Yes, sir.

Q. I will ask you to state in your own way what you did; what condition you found when you got there, and what you did.

A. I saw the fire had started in the southeast corner and was spreading, and I ran right to our office, which is right opposite; car we had there called our office. And then through over to the yards and around on the side, and I met Mr. Stapleton and the crowd started; and I asked two switchmen if they wouldn't go and pull on the other side of the house before the fire got started there, but they wouldn't do it.

Q. Which side of the house were the switchmen you have in mind?

A. East side of the house.

Q. How far from the house?

A. They were pulling their cars there, about two or three tracks.

Q. Whose cars?

A. Pulling on their own cars, the Terminal cars.

214 Q. Terminal cars?

A. Yes, sir.

Q. Were those cars being pulled then in immediate danger of fire?

A. No, sir.

Q. What cars was it you had in mind when you asked them to cease pulling there and pull at the other place?

A. I meant pull the cars on forty-four and forty-five, next to the warehouse, on the west side.

Q. They declined?

A. Yes, sir.

Q. What did they say to you about it?

A. One of them wanted to know when I got my name on the time-card; told me to go and mind my business.

Q. Did you call Stapleton's attention to the fact that the cars that were being pulled were remote from the fire and those you wanted pulled were nearer the fire?

A. Yes, sir; but he said what can we do; they won't do nothing.

Q. Did they pull any C., P. & St. L. cars, and if so, when did they begin to do that?

A. Well, they pulled track forty-nine, but when I came round there, on that side, I asked them to pull track forty-seven. There was a Glen Carbon car, a lot of this glucose merchandise there. They pulled forty-nine, and then the Merchants' Bridge engine pulled in and blocked it behind the "Y."

Q. Blocked what?

A. Blocked the engine by pushing cars down so it couldn't get out.

Q. What engine was blocked?

A. Merchants' Bridge engine was blocked, when it did pull in, blocked by the Terminal.

Q. So it couldn't get out?

A. Yes, sir.

Q. Was your attention called to the C., P. & St. L. engine near the freight-house, at the time, as to whether it was in a position to be used?

A. Yes, sir; so the hostler stated.

Q. Why wasn't it used?

A. I was there, but I asked the hostler afterwards and he said he couldn't get out on account of the "Y" being blocked, and I noticed it blocked.

Q. What was it blocked it?

A. The bridge pushing down cars on the "Y."

Q. You mean the Terminal Railroad bridge?

215 A. Yes, sir.

Q. Do you know the number of that car that contained the merchandise you refer to?

A. Yes, sir.

Q. What was it?

A. Forty twenty (?) C., P. & St. L.

Q. As the result of your observation and what you tried to do, state whether the cars of the C., P. & St. L. received the same attention from the employés of the Railroad Terminal Association that the cars of the Terminal Association did.

(Objection.—Incompetent, immaterial and irrelevant; not a matter of expert testimony and not competent for this witness to give.)

The MASTER: I will not exclude it.
(Exception by intervenors.)

A. No, they did not.

Q. As the result of your observation, what you saw done and what you did, I will ask whether any of the cars you saw in the house need to have burned?

(Objection, for the same reason.)

A. When I went over on the east side to where the engines were, the cars on forty-four next to that side were perfectly safe.

Q. Any reason why these cars couldn't have been taken out?

(Objection.)

A. No, sir.

Q. Were you familiar with the location of this freight-transfer house and its condition whether open or closed?

A. I used to go in there fifteen or twenty times a day.

Q. What was it stored with?

A. Hay.

Q. Anything to prevent sparks from locomotives flying into the entries?

A. No, sir; the front perfectly open.

Q. What do you mean by front?

A. That is the north where they push the cars in.

Q. Entirely open?

A. Yes, sir.

Q. I will ask you whether the same is true with reference to the south end?

A. Yes, sir.

Q. That was open also?

A. Yes, sir.

Q. Side doors closed or not?

A. Closed but in poor condition; a fellow could push through some of the doors on the side; if we wanted to go in where
216 the hay was not piled too close, we just pushed in the door and slipped in through.

Q. How close was the hay on either side of the freight-house?

A. Pretty hard to tell; piled very high in some places; other places low; lots of places the wire was broken and the hay had fallen and it was right at the edge of the platform.

Q. Next to the outer doors?

A. Yes, sir.

Q. Wire that bailed the hay, and the hay had fallen down next to the door?

A. Next the platform and track where they unloaded.

Mr. HANSON: How long before the fire did you see that condition? Not quite through with him yet; did you ever see the engine of the Terminal Railroad Association running into this transfer-house with the hay in there?

A. Yes, sir.

Q. Ever call their attention or anybody's attention, any of the

Transfer Association employés to the fact of the danger of the fire, and if so, where and under what circumstances?

A. I went there about two weeks before the fire to get a bucket of water one afternoon, and there was about three cars in the freight-house; they went in after one with the engine alone and drawed it out; fellow they call Sandy; I said You've got nerve going in there with your engine; Oh, well, he says, nothing to you. Last time I looked in there I saw smoke rolling up out of the lattice-work on the roof.

Q. Hay in there at the same time?

A. Yes, sir.

Q. Know where this hay came from?

A. No, sir; I remember their storing it.

Q. Under the control of the C., P. & St. L. in any way?

A. No, sir; not that I know.

Cross-examination by Mr. HANSON:

Q. How long before the fire had you seen this condition, with reference to hay hanging out of the bales broken?

A. As long as I have been going in there I have noticed loose hay.

Q. Two or three months?

A. No, I would say a month.

Q. I understand it had been used about three months before the fire to store hay; did you hear Mr. Wiedner's testimony?

A. Perhaps it might, I didn't have occasion to know.

Q. So observable to you that there was danger that you called attention of one of the employés to the fact?

217 A. Standing on the platform.

Q. What were you doing there fifteen or twenty times a day?

A. Used to go after water and sometimes go to fix a car.

Q. What was your employment?

A. Car-repairer.

Q. For the C., P. & St. L.?

A. Yes, sir.

Q. There fifteen or twenty times a day in this warehouse?

A. Yes, sir.

Q. How far was this warehouse from Mr. Calvert's office?

A. From the C., P. & St. L. freight office?

Q. Yes, sir; Mr. Calvert's office.

A. About half a mile or three-quarters.

Q. Did his business require him over there occasionally?

A. Yes, sir.

Q. How often?

A. I couldn't say exactly.

Q. While you were employed there two or three months before the fire see him there?

A. Saw him a month before the fire.

Q. How was it about Mr. Stapleton, see him?

A. Yes, sir; would see him there.

Q. What other employés of the C., P. & St. L. did you see about this warehouse?

A. Saw none, only the fellow that worked with me.

Q. What had Mr. Calvert or Mr. Stapleton to do about the warehouse so much?

A. Don't know, never asked them.

Q. You saw them there, but don't know what they were there for?

A. That's it.

Q. You went there to repair cars?

A. Yes, sir.

Redirect by Mr. WILSON:

Q. How close was your workshop or regular place of business, as a car-repairer to the freight-transfer house?

A. Six tracks; distance of about twenty-five or thirty feet.

Q. That is the way you were there?

A. Yes, sir.

Q. Car-repairer, and about your proper business?

A. Yes, sir.

Q. I will ask you whether this general condition as to the loose hay and the condition of the hay and so forth was not the
218 condition on each of the times you went in there, was not the general condition?

A. Yes, sir; always so; tramps used to go in there to sleep at night.

Q. Are you now in the employ of the C, P. & St. L.?

A. No, sir.

Q. Did you have in your capacity of car-repairer any control or right of direction whatever as to the kind of use that was being made of this freight-house, or who stayed there?

A. You mean if I had any business ordering anybody around there?

Q. Yes, sir.

A. No, sir.

Q. If there were tramps in there was it your business to keep them out?

A. No, sir.

Cross-examination by Mr. HANSON:

Q. Did you report that to anybody, about tramps sleeping there?

A. No, sir; I didn't.

Mr. WILSON: I desire to call the attention of the master to the fact that the witness Keemer, who was present under a subpœna, without my knowledge, in the course of his business in the employ of the Bluff Line railroad was called to take a train out, and has left.

Mr. HANSON: Maybe we can admit what you want to prove by

him. (After examining a paper handed him by Mr. Wilson.) I will admit that if this witness was present and sworn, he would testify as Mr. Wilson will now read to the reporter; but that part of the testimony of the witness as to what could have been done if something else had not been done, is taken under my exception.

Mr. WILSON: The night of October 28th, 1894, the witness Keemer was sleeping in caboose seventy-eight, C., P. & St. L. railway; that he was conductor of that train; that he was awakened by a brakeman, Thomas Tahan, saying, Get up, see the fire; that he did get up, climbed into the cupola of the caboose and saw that the transfer shed was afire in the southeast end when he first saw it; that he dressed as quickly as possible and went out to see what he could do, and that by the time he got to the main track or "Y" a switch-engine of the Terminal Railroad Association blocked his engine in so as to prevent him from rendering any help from that source; then he asked a switchman of the Terminal Railroad
219 Association to pull a certain caboose out and he said Damn the caboose, save the cars, and that the switchman then pulled a cut of cars from between the caboose and the fire and started up in his yard; that a foreman of the Terminal Association stopped them and told them to get the caboose; they went back, coupled on the caboose and cut off a car of merchandise attached to it; it was a car of merchandise; and that he believed from his observation more cars could have been saved than were saved; that he himself took water out of a cooler in the caboose and put out a fire burning on one of the cars.

Your honor, that is the statement, and your honor holds, I understand, that the statement should go in, and I should proceed, without having the benefit of the statement of the witness.

The MASTER: I don't hold that. I hold if you want to put it in you can do so.

Mr. HANSON: It is understood that if the witness was present he would testify as the Major has read to the reporter.

The MASTER: I don't compel you to put him in now.

Mr. WILSON: I had understood, may it please your honor, that under the ruling and agreement of opposing counsel, stipulating as to what the witnsss would testify to, defeated an application or movement for postponement of the hearing, until the witness can be present. If your honor does not hold that I am concluded by the stipulation of counsel; I very much prefer to call the witness himself at the very earliest date and have him testify. I would rather have his deposition than his statement.

Mr. HANSON: If you want to call him later on I will not object.

Mr. WILSON: With the understanding that I may call the witness at a later time if I want to, let the record stand.

Testimony of S. S. Bennett.

S. S. BENNETT, sworn.

Direct by Mr. WILSON:

Q. Where do you live?
A. Springfield.
Q. Where were you employed and in the service of what company the night of October 28th, 1894?
A. Brakeman on the C., P. & St. L. railroad.
Q. Remember the fire that night?
A. Yes, sir; asleep in caboose seventy-eight.
Q. Who was with you at the time?
A. Conductor Keemer and Brakeman Tehan.
220 Q. How far was the caboose in which you were sleeping from the freight warehouse where the fire occurred?
A. It was about three tracks I think or four.
Q. When did you get into the yard from that run?
A. Came in Saturday night.
Q. Who was conductor?
A. Keemer.
Q. Tahan the other brakeman?
A. Yes, sir.
Q. Three tracks from the fire?
A. Yes, sir.
Q. When was your attention called to the fire and by whom?
A. Tehan got up; when I looked at my watch it was about five minutes to eleven. He got up and hollered there was a fire; when we got out it was eleven or eleven five.
Q. How far had the fire progressed?
A. Half of the building when we saw it.
Q. What part of the building?
A. West side.
Q. Which end?
A. I suppose you call it the south end from here.
Q. Locating the building from here, I will ask you whether it was not the southeast rather than the southwest that was afire?
A. Probably it was.
Q. What did you do when your attention was called to the fire and you were fully awake?
A. Got out to see what I could do.
Q. What did you do?
A. Found couldn't get no cars out and went to transferring merchandise to get it out of the way; canned goods.
Q. You state when you found you couldn't get cars out you went to transferring merchandise; tell the master why you couldn't move the cars; what prevented you?
A. Engine was blocked; Conductor Keemer said, Get our cars out; found it was blocked in.
Q. Who blocked it?

A. The Terminal, I suppose; blocked so our engine couldn't get out; shoved a cut of cars down on the "Y" and blocked our engine.

Q. Any effort made to remove——

A. Couldn't say.

Q. When you got ready to move your engine——

A. Couldn't get it out.

Q. After that you got to handling individual merchandise?

A. Yes, sir.

221 Q. Was the engine in condition to move?

A. Yes, sir.

Q. Something has been said in this testimony about a certain car of merchandise which might have been moved and which was not moved; what car is referred to; tell what you know?

A. Could have been got out just as easy as our caboose was got out, for it was coupled on.

Mr. HANSON: What was it?

A. Merchandise, Glen Carbon.

Mr. HANSON: Loaded with what?

A. Canned goods.

Q. General merchandise?

A. Yes, sir.

Q. Coupled on the caboose?

A. Yes, sir.

Q. Caboose saved?

A. Yes, sir.

Q. Why wasn't the car of the merchandise saved?

A. Cut off.

Q. Why?

A. Don't know.

Q. Who pulled the caboose out?

A. The Terminal engine.

Q. Any of the C., P. & St. L. engaged in handling?

A. No, sir; the Terminal engine went and caught hold of it and shoved it on the "Y."

Q. Attention called to the fact that the car of merchandise ties on, ought to have been hauled out at the time?

A. I can't say; called attention to the caboose; cars on the track; they said, Damn the caboose—get the cars out. That was all the remark I heard made.

Q. Merchandise car was cut off from the caboose and left to burn?

A. Yes, sir.

Q. How long were you there during the fire?

A. From the time the fire broke out till possibly twelve thirty; then went to bed.

Q. Who was in charge of and in control and direction of the resistance and opposition to the fire, fighting the fire?

A. All the Terminal people around there.

Q. Were they subject to your direction or that of Mr. Keemer?

A. No, sir, we had nothing to do with them.

Q. You stated you were there from about five minutes before eleven till when?

222 A. Till twelve thirty.

Q. I will ask you, as the result of your observations, what you saw done, what you tried to do and what you saw others doing, if all the cars of the C., P., & St. L. that might have been saved were saved?

(Objection.—Not a matter of expert opinion, and is immaterial in this controversy. It is for the court and not the witness to judge or give an opinion. Objection and exception.)

A. No, sir; don't think they were.

Q. Were there any bystanders, crowd of people gathered?

A. Yes, sir, large crowd.

Q. Any comments on the question of cutting this car loose?

(Objection. Sustained.)

Q. I expected to prove in response to that question, that the cutting off of this car of merchandise by the employés of the Railroad Terminal Association was so obviously a mistake, it raised a general outcry among the outsiders, and after that it was coupled on and pulled out in a burning condition.

The MASTER: You can except in the same way.

Q. I desire to have the exception noted.

Mr. WILSON: I next desire to put on the witness stand a witness by the name of Malone. We telegraphed and took all the proper steps and provisions in the way of tendering the witness, fees and so forth, but he was called out of town yesterday evening and was unable to attend.

Mr. HANSON: What do you want to prove by him?

Mr. WILSON: Here is his letter dated November 3, 1894.

Mr. HANSON (after inspecting the letter): I am willing he should testify that, subject to objections and inquiries involving his opinion. Those should be taken against my objection and exception.

Mr. WILSON: And subject to the understanding that if we can get the witness present personally, and we desire it, I now offer his official report of his knowledge of the fire, dated at East St. Louis, third day of November, 1894, and ask that it may be incorporated in the record.

Mr. HANSON: Consent that that may be received as his testimony; that is, if he was present he would testify to that statement and subject to my objections as to matters that involve his opinions.

#74. EAST ST. LOUIS, ILL., *Nov.* 3, 1894.

W. H. Calvert, Esq., agent, East St. Louis, Ill.

DEAR SIR: I got to the scene of the fire Sunday night last about 11.20. The cars on track No. 44 were then commencing to

223 burn. Cars on tracks 45, 46, 47, 48 and 49 could have been saved if the proper effort was made by the bridge crews. They

blocked our engine in the engine track, and would not allow the engineer to pull out. If our engine was at liberty, I think we could have saved all the cars on the tracks above mentioned. I assisted in transferring some canned goods, door frames and bed springs, and chained up cars on No. 50, so they could be pulled out. The bridge were working on their own side of the house (south), and did not do anything on our side until theirs was clear. The first engine I saw after I arrived there was a Merchants' Bridge engine on the north side of the house. They stayed there more than ten minutes before making any effort to pull cars, on account of an electric light wire being across the track. We were urging them all the time to go in and pull the merchandise car, but to no purpose.

Yours truly, J. B. MALONE.

Testimony of W. H. Calvert.

Mr. CALVERT recalled.

Direct by Mr. WILSON:

Q. You have been sworn in behalf of the petitioner?

A. Yes, sir.

Q. I now recall him in behalf of the receiver. I believe you have said that you were agent of the C., P. & St. L., in charge of its business at East St. Louis on the night of October 28, 1894, prior and subsequent to that time?

A. Yes, sir.

Q. Still in the service of the receiver?

A. Yes, sir.

Q. How long have you been employed at East St. Louis in and about the freight business of the C., P. & St. L. railway?

A. Three and a half years.

Q. That includes the period prior to the receivership and subsequent?

A. Yes, sir.

Q. I wish you would state again in brief terms your general duties.

A. I have general supervision of all the work of the C., P. & St. L. Company at that point.

Q. Familiar with the details under which the freight business of the receiver of the C., P. & St. L. is handled, are you?

A. Yes, sir.

Q. I will ask you if you are familiar with the location of the tracks of the main line of the C., P. & St. L. and on the yards of the St. Louis Railroad Terminal Association?

224 A. Yes, sir.

Q. Where do the tracks of the C., P. & St. L. end and the tracks of the Terminal begin? You have seen this blue print?

A. I have seen the blue print, but I don't believe I could explain without it.

(Blue print exhibited.)

Q. Look at the blue print and state in reference to it where the

tracks of the C., P. & St. L. railway end and those of the Terminal Association begin, so far as handling our freight is concerned.

A. Well, that blue print doesn't extend far enough. It would be off up in here, where our tracks would end; that is, a continuation of these tracks.

Q. In what direction in reference to the freight-house and how far away from it?

A. Northwest probably a quarter of a mile. The blue print don't go far enough over.

Q. As I understand, the C., P. & St. L. tracks are not represented on the blue print?

A. The C., P. & St. L. main-line terminus is not shown.

Q. And the end of the C., P. & St. L. tracks was at a distance how far north and west?

A. About a quarter of a mile from the freight terminal transfer warehouse.

Q. That is the warehouse referred to in the testimony?

A. Yes, sir.

Q. As the cars came over the C., P. & St. L. railroad, I will ask where the deposit is or was, so far as the engine is concerned, and the immediate control of those cars by the engine?

A. On these "Y's" that come right round here.

Q. Can you name those "Y's" so that any one reading the testimony could identify them from the blue print?

A. I think they are designated as the middle, north and south "Y's."

Mr. HANSON: Suppose we mark them.

Q. I will ask you to take a pen and mark on the blue print by crosses the tracks you refer to as the "Y's" tracks?

A. (Witness does so.)

Q. Make a good plain mark for all of them. Where do our engines couple and uncouple from the freight trains?

A. On those "Y's."

Q. I will ask you if those "Y's" are the designated places of deposit as between the Terminal Railroad Association and the C., P. & St. L.?

A. Yes, sir; that is as far as our trains go.

225 Q. I will ask you what understanding, if any there was, with the Terminal Association in reference to cars standing upon these tracks; who was to handle them and take charge of them?

Mr. HANSON: Is that controlled by written agreement, as to the handling of the cars; breaking up and making up trains?

A. There was an agreement at one time, which was entered into for six months, from June 1, 1891; I believe that was the date. Don't think that has been renewed; the work is being done I think under the provisions of that agreement with a great many alterations put on by the Terminal Association.

Mr. HANSON: Yet you know there is a written agreement in force at this time continuously, prior to the fire and since?

A. I have a copy of an agreement made for six months. If that agreement has ever been renewed I have never seen a copy of it and never been advised of it.

Mr. HANSON: If then that is controlled by agreement, I would ask to let the agreement speak for itself in the transaction of the business here, and not the witness.

Q. I will ask the witness what the understanding was under which these cars were deposited there, so far as care, custody and control of them is concerned, and I think the witness ought to answer the question as propounded to him?

(Objection.—If there was an agreement, that must control and not the witness. He has not the power to make a change in the agreement.)

A. I would say the original agreement as to handling that work——

Mr. HANSON: Not asking for the original agreement. I am asking if there was not an agreement in reference to making up and breaking up trains at that point?

Q. Now I ask the witness to answer that question?

Mr. HANSON: There is an agreement attached to the receiver's answer, as the agreement, and that provides for the making and breaking up of these trains; and that agreement controls instead of the witness.

Q. No evidence that the receiver ever ratified or adopted this contract, we claim, as the witness has stated, that the original agreement was modified entirely at the option of the Railroad Terminal Association.

Mr. HANSON: Not for the witness to say whether changed or not that agreement controls. I have asserted it as the agreement under which this work has been done at this point. I insist it is not proper for the witness to say what the agreement was when it is in writing.

The MASTER: His understanding of the agreement would
226 not control the agreement. He may give his understanding of it. The agreement may show an entirely different state of facts. I will admit his answer.

Cross-examination by Mr. HANSON:

Q. What was the date of this agreement, you say six months?

A. June 1, 1891.

Q. Do you know whether since that time there has been an agreement, a written agreement, made between your company and the Terminal Association?

A. No, I don't. I know since that time I have made an agreement with the representative of the Terminal Association myself for the modification of rules which they had put into effect.

Q. I am asking whether you know there has been a written agreement since that date, between the officers of the respective companies in reference to this work?

A. Will not say that I know there has not. Don't know that

there has. Don't know whether a written agreement or not. But if there was our company would not allow the Terminal Association to push us down there any way they want to whenever they see fit.

Q. There is a copy of the original agreement made in 1892. That is subsequent to the six months' agreement, isn't it?

A. Yes, sir.

Q. Do you know that that has been changed by the officers of the respective companies?

A. Yes, sir; I can swear positively that that was not the agreement under which the work was being done.

Q. I did not ask you that. I ask if you know that the officers have changed that by any other written agreement?

A. Can't say about that; can't say whether they have changed it or not, but I know our business has not been handled on the terms of this agreement; was not in October, 1894. Has been changed by the Terminal Association, whether by consent of our folks or not.

Q. Do you know that that agreement has been changed by another written agreement?

A. No, sir.

Q. Then, so far as you know, that was in force at the time of the fire?

A. Don't know that it was.

Q. Then you don't know anything about the agreement between these companies with respect to the transaction of the business?

227 A. Not since that original agreement.

Mr. HANSON: Now, I object to what the witness says with respect to the agreement.

Redirect by Mr. WILSON:

Q. I understand he may answer.

The MASTER: I ruled that before, but he seems to have ruled himself out by saying he knows nothing about it.

Q. Do I understand your honor to rule that he shall not answer a question as to what the understanding was as to the deposit of cars upon the "Y's" indicated on the blue print, and as to the care, custody and control of them?

The MASTER: No, sir; I do not rule it out.

Q. I will ask the reporter, then, to read the question. (Reporter then read the question, as follows:) I ask the witness what the understanding was under which these cars were deposited there, so far as the cars, custody and control of them is concerned?

Objection.—As the question is put, it is objectionable.)

A. The trains after arriving in the bridge yard on one of the three "Y's" is deposited there, our engine is cut loose and taken in charge by a hostler, and the train is then taken in charge by the Terminal Railroad Association and is broken up, and the cars deposited one place and another on the tracks in the yard.

Q. Your attention has been called, in the course of the examination of other witnesses, to certain waybills which are in evidence; waybills, for instance, running from a place called Wykoff, and destined to East St. Louis, with a memorandum on the face of the waybill as to the name of the consignee and his residence; now I will ask you to state at what point in the course of business the C., P. & St. L. railroad ceased to have control over cars such as have been indicated by that waybill as a common carrier.

(Objection.—As asking for the opinion of witness and giving the law of the case. He says what time they ceased to have control of the cars as a common carrier. That is the question for the master and the court. Object for that reason. Let him state the facts and some one else decide the question.)

Q. May he answer, subject to exception?

The MASTER: Yes, sir.

A. So far as the final disposition of the property is concerned we retain a certain control of it, but so far as the physical movement of the car is concerned it is entirely out of our hands.

228 Q. Did you have any more handling of that car?

A. No, sir.

Q. Did your engine ever attach to or tie onto those cars?

A. No, sir; entirely through with them, so far as the actual movement about the yard is concerned.

Q. What is the destination of the cars in the course of business consigned to parties living in St. Louis as indicated upon the waybill; what is the destination as indicated by the waybill?

A. Governed altogether by the wishes of the consignee.

Q. The fact that cars were billed as I have indicated, was that conclusive of the fact that the cars were to go to St. Louis?

A. Not by any means.

Q. What became of those cars, and how were they disposed of and handled?

A. Ordered to various points on the river; some of them to Hines' Brewing Company, East St. Louis; some to Belleville, and I can't recall all the places. But there were some three or four or five points about East St. Louis where they were frequently ordered and didn't go across the river at all. Then they were delivered in a dozen different places in St. Louis.

Q. Who made those deliveries after you had received directions as to the place of deposit?

A. Such as were ordered delivered on the tracks of the Terminal Association, they made the final delivery; such as were ordered delivered may be on tracks of various connecting lines, the Terminal Association delivered the cars to such, who made final delivery.

Q. You didn't handle the cars at all?

A. No, sir.

Q. Who gave directions as to the final disposition of the cars?

A. The consignees.

Q. Through whom did they give them?

A. Through me.
Q. Always through you?
A. Not always.
Q. Do you know Mr. Roederer, the joint agent?
A. Joint agent of the Terminal Association and the Merchants' bridge; yes, sir.
Q. Ever get directions from him?
A. Yes, sir; I have received orders from him for the delivery of cars to their company, and barley in particular, where he would merely send me a message over his own name stating that he held an order, say from the Teichman Commission Company, if you please, car so and so, please deliver to St. Louis, such and such a place. The original order of the Teichman Commission Company sometimes would follow, sometimes would not.
229 Q. What proportion of these cars containing barley went to St. Louis and to other places?
A. That is a pretty hard question to answer.
Q. As near as you can.
A. I presume there was ninety per cent. of them crossed the river to various points in St. Louis; ten per cent. went to various points around East St. Louis.
Q. I understood you to say, the place of deposit of cars coming in was on these "Y's" you have marked.
A. So far as we are concerned the C., P. & St. L.
Q. After the consignee had been heard from, either directly to you or through Roederer or any other agent of the Terminal Association, or whatever source, did the C., P. & St. L. Company ever tie onto them again?
A. No, sir.
Q. Did you, as chief agent of the receiver at East St. Louis, have any control or direction as to the particular tracks in the yard of the Terminal Association upon which the cars were to be deposited and placed?
A. No, sir.
Q. Who directed that and controlled it?
A. The Terminal Railroad Association.
Q. Something has been said in the course of this testimony about the freight transfer house and tracks from forty to fifty; under whose direction and control was the freight-transfer house?
A. Terminal Railroad Association's.
Q. Did you have any control over it whatever?
A. None whatever.
Q. Did you ever assume to act under order or directions either as to what should be stored in the warehouse or as to the manner in which its contents should be looked after?
A. No, sir.
Q. Did you consider you had any right?
A. No, sir; we had none and didn't consider we had.
Q. I will ask you whether the tracks from forty to fifty were, as has been stated by witnesses in behalf of the Terminal Association, under your exclusive control and direction, as agent of the receiver.

A. No, sir.

Q. What control did you have?

A. I had no control; couldn't order cars put on there or cars taken off. Such as the Terminal Association might elect to put on there were put there.

Q. Do you know whether the tracks from forty to fifty were used in common and promiscuously?

230 A. Yes, sir.

Mr. HANSON: Those the tracks marked red?

A. Those indicated there by red lines.

Q. In reference to the statements made by witnesses on behalf of the Terminal Association that the tracks from forty to fifty were under exclusive control by the C., P. & St. L., is that true?

A. No, sir.

Mr. HANSON: Never stated that; you tried to make them, but they never did.

Q. Did you have any control of the cars?

A. Never had any control over any tracks in the Terminal Association yard.

Q. Was your attention ever called to the use that was being made of this freight-transfer house, and if so when and by whom?

A. Yes, sir; my attention was called to it on several occasions. One time they leased it for the use of some man from Milwaukee; can't recall his name. For the purpose of working over a considerable quantity of grain damaged in an elevator at Carondelet. He had exclusive use of the house for some months. Cars all loaded at Carondelet and brought over and the grain worked over, gathered up and reshipped from the house.

Q. At a later time or about the fire?

A. At a later time, on the occasion of the hay, use of the house for hay, my attention was called to it. I also spoke to a representative of the Terminal Association. Can't say whether Mr. Felps or Mr. Dunlap, the general yardmaster; as to the chances of a big fire.

Q. Did you call attention——

A. I did one of them, but I don't remember which it was.

Q. The fact that storing hay there and putting your cars next to it, exposed your cars unnecessarily to danger?

A. Yes, sir.

Q. Did you protest against it?

A. Can't say I protested, because it was little use to protest, against anything. I spoke to them about the liability of conflagration from the hay with those engines working round. Can't say I entered a protest: merely in a conversation spoke about it.

Q. Was your conversation calculated to call their attention also to the fact?

A. Yes, sir; apparent to anybody going around there that there was great danger, without their attention being called to it.

Q. You have heard what witnesses have said called by the receiver as to the condition of the freight-house, the bad condition of the doors, being open at both ends, that true?

231 A. Yes, sir.
Q. Ever in the freight-house?
A. Many a time.
Q. Were you in it during the time it was stored with hay?
A. Can't say that I was through it; I was there and looked in it; can't say I walked through it, don't remember whether I did or not.
Q. You were present last Tuesday during the deposition of Mr. Felps?
A. Yes, sir.
Q. I will call your attention to the question and answer of Mr. Felps at page 7, as follows:
"Now when a train of the receiver comes into this yard from the north, where will it come to a stop in reference to the tracks on this map?" The answer is—Mr. Hanson says in reply to the suggestion, I will designate the track—then the answer is, "Tracks known as three 'Y' tracks, trains come in there and stop."
That in accordance with your knowledge?
A. Yes, sir.
Q. You have reference to the "Y's"?
A. Yes, sir.
Q. I read now: "Those 'Y' tracks are the tracks which appear on this map as connecting—marked Terminal Association range yard—to the Wabash junction. They are just north—answer, North and west if the portion of the yard assigned to the C., P. & St. L." Is that true?
A. Yes, sir.
Q. "North and west of the tracks marked red. Answer, Yes, sir." Is that true?
A. Yes, sir.
Q. Then this question: "Train comes in on this 'Y,' what is done with it by the receiver, if anything? Answer, The train stops on the 'Y' and the receiver is then done with them." Do you agree with that statement?
A. Yes, sir.
Q. Copy of a statement purporting to have been made by you, showing the loss and damage by this fire of October 28th. I will ask you for whom that statement was prepared, and on what account?
A. It was prepared on the request of Mr. Gregory in support of a claim against the insurance company.
Q. You have heard the depositions of the several witnesses; is there anything further that you think would be of advantage or interest to the receiver that you have not stated, or that I have not covered by my question, if so, state it.
A. I don't recall anything just now.

232 Cross-examination by Mr. HANSON:

Q. This question which the Major read you from the testimony of Mr. Felps, in which he answers, The train stops on the "Y," and the receiver is done with them; you understand by that the receiver is done handling the train?

A. Yes, sir; I understand by that, and no doubt Mr. Felps intended to convey, that, as far as the receiver is concerned, we could not move the cars any more.

Q. The receiver had no switch-engine or switch-yard at this place, or the C., P. & St. L.?

A. No, sir.

Q. So an arrangement was made between the two companies for the Terminal Association to handle the train of cars of the receiver of the C., P. & St. L. at St. Louis?

A. Yes, sir.

Q. When a train came in on this "Y," and the receiver's engine detached, and the Terminal Association would take the train, break it up and set the cars out on these tracks, they did that under this agreement, and the C., P. & St. L. paid fifty cents a car for doing that particular work, did it not?

A. Yes, sir.

Q. Now, then, Hines' Brewing Company and Belleville and other places you spoke of are not on the tracks of the C., P. & St. L., are they?

A. No, sir.

Q. So all this barley that came in was delivered over the Terminal Association to be taken to some other point not on your line?

A. No, sir; not all delivered over by a good deal.

Q. Delivered through to some other line?

A. Delivered much of it to the Wiggins Ferry Company.

Q. Yes, sir; when it was consigned that way?

A. Yes, sir.

Q. You spoke of these cars; you say about ninety per cent. of the cars would go over to St. Louis, and ten per cent. to other points; what do you mean?

A. I refer to the barley business of the season.

Q. How did you know that the receiver's cars or the cars of the C., P. and St. L. were usually and generally placed on these tracks marked red?

A. Yes, sir.

Q. And had been, in the practice of handling the cars?

A. Yes, sir; in fact had been placed all around there.

Q. Just prior to the fire you knew a great many of the receiver's cars were standing in the vicinity of that warehouse?

233 A. Yes, sir.

Q. Why did you call the attention of Mr. Felps or some one else of the Terminal Association to the fact that there was great danger, that hay being there, in the engines running about; why did you call their attention to that condition?

A. I didn't testify that I called the attention of Mr. Felps or some one else.

Q. Mr. Felps or Mr. Dunlap you said.

A. Well, I presume it was done from the fact that I was around looking after the business of the company generally and saw the danger myself.

Q. Were you about this warehouse frequently?

A. Frequently had business there with men in my employ; also the car-department men; car-repairers; also the Terminal Association.

Q. While you were there you were there for the receiver of the C., P. and St. L.?

A. Yes, sir; walked around to see the location and situation.

Q. How long had you noticed the disposition of things in this warehouse, as to hay being in there, before the fire?

A. Well, I don't remember just how I came by the information, but some one in my employ reported it to me, and I made a trip up there to see what the situation was.

Q. Do you know how long that was before the fire?

A. Know when they first began to use this house for that purpose; probably six weeks.

Q. Continue to use that all the time, handling hay at this warehouse?

A. Yes, sir; I so understand; using it continuously; had hay in it.

Q. How do you know that; were you there frequently?

A. How do I know what?

Q. That there was hay there up to the time of the fire?

A. Saw it.

Q. When you were going there?

A. Yes, sir.

Redirect by Mr. WILSON:

Q. Was there any other place in which you could have deposited these cars than the place of deposit designated in these "Y's"?

A. Those "Y's" were designated by the Terminal Association as the place where we should deposit our cars. When our train pulled into the yard, their switch-tender at the bridge junction, Wabash junction they call it, he threw the switches leading
234 to these "Y's." Our trains were not permitted to go in any other part of the yard.

Q. Did you have any control, authority or direction in the course of your administration down there by which you could have changed the location of these cars?

A. No, sir; neither was I consulted as to what suited our interests in regard to the matter.

Q. Who had the right of direction and control, and who exercised it as to these cars?

A. Well, that is a question I can't answer, as to what person; but the Terminal Railroad Association was the corporation that had that right. They had their general agent and also yardmaster, and I can't answer whether the agent or the yardmaster is the authority governing the movement of cars in the yard.

Q. Certain that you didn't have it?

A. Certain I didn't have it.

Q. I omitted to ask you as to these cars coming to the C., P. & St. L. from the Chicago, Milwaukee and St. Paul, how long, as a rule, the consignees left them there?

(Objection.—Incompetent, immaterial and irrelevant; not in the issue.)

A. That is a pretty hard matter for me to give an intelligent answer on.

Q. Shortest and longest time?

A. There is a great many of the cars we have orders for before they arrive, giving us designated points for their delivery; then there is a great many of them we don't get orders on for some time. Furthermore, there is one or two of the firms there that place an order at the beginning of the season to give either the Wiggins ferry Company or the Terminal Association all their business, which is then held by the Terminal Association or the Wiggins ferry, and forwarded on to the destination by orders direct from the consignees—either the Wiggins ferry or the Terminal Association. I should judge the average detention of that barley business would be, well, I will say a week. That is simply my guess.

Q. Give the shortest time and the longest time, and then the average, in your opinion?

A. Some of them would stay there for thirty days, and then some would go right through without stopping.

Q. Depended on——

A. Depended on the condition of the market, and the market was governed altogether by the condition of the weather; during warm weather they wouldn't unload; if we got a cold spell we would get a rush on the barley. Warm, slack up.

235 Q. After the cars arrived and you put them at the designated place of deposit on these "Y's," by means of our engines, I will ask you whether or not you proceeded to take the direction of the consignee pursuant to the waybill that accompanied the car, as a new matter, outside of the waybill, and for the convenience of the consignee?

A. New matter altogether. All barley business handled under special instructions issued by the consignees of the shippers. Furnished waybills to us. Information furnished on the waybills to us. Not so all of it; some, where it was billed directly through, of course not stopping; didn't ask the consignee for the disposition of that, but that is only to a brewery, for instance, that may know just how much they want to use, and have it billed that way; but all the other firms go and get special orders from the consignees.

—. As to the new agreement and direction from the consignee to you and as to the direction you gave to the Terminal Association, I will ask you whether that business was done in that method, with the knowledge, consent and approval of the Terminal Association and with their co-operation?

A. Well, they are aware of the way in which that business is handled.

Q. They knew of it?

A. They knew the manner in which it was handled, yes.

Q. Referring again to the waybill from Wycoff, if that was all you had received either from the consignee or the original shipper

at Wycoff, if you had never had any other direction, what more would you have had to do to discharge your duty as to that shipment?

Objection.—Asking for the legal opinion of the witness.

Q. If there had been no further direction than that contained in the waybill from Wycoff——

Mr. HANSON: The witness should understand under the mark consignee, there is St. Louis, Missouri, Teichman Company.

A. If I had been unable to receive instructions from the consignee, I would have communicated with the billing agent and asked him.
Q. Who do you mean?
A. Agent at the point of origin, Wycoff.

Cross-examination by Mr. HANSON:

Q. Then with such a waybill marked Teichman Commission Company, St. Louis, Missouri, before you referred the matter to the agent at Wycoff where the shipment started, you would find out where the Teichman Commission Company was, and where you could make delivery of cars?
236 A. Yes, sir.
Q. This testimony you have been giving with reference to custom applies to shipments generally of barley?
A. Yes, sir; so far as the C., P. & St. L. is concerned; can't answer as to custom on roads.

Redirect by Mr. WILSON:

Q. I will ask you, would you have undertaken to send this car to St. Louis, if you hadn't got the direction——
A. No, sir; because I would have had no guide.
Q. East St. Louis was the destination?
A. Yes, sir; until we received orders from the consignee as to the final disposition.

Cross-examination by Mr. HANSON:

Q. Would you seek out information to enable you to make a delivery of the contents of that car?
A. Yes, sir.
Q. Taking this waybill as a starter to find out?
A. Yes, sir.
Q. The only means you had?
A. The only means I had of learning with whom I should communicate for the order.

Redirect by Mr. WILSON:

Q. It is suggested by the receiver, who is present, and I will ask you if it is not and was not the ordinary way of billing these cars to bill them to East St. Louis and then leave the consignee to direct

you as to how or by what route they were to be shipped further to the final point of deposit?

A. That is the custom of billing freight, to lines entering East St. Louis.

Q. I will ask you whether that was done as part of the route for which you had received your full pay?

A. How is that?

Q. Was that included in the contract under which the freight was hauled?

A. Yes, sir.

Q. The cost of the transfer to St. Louis?

A. Yes, sir.

Q. Added that to the freight bill afterwards?

A. That is some of it we pay transfer on; some we don't.

237 Q. How do you distinguish?

A. That is governed altogether by the billing agent.

Q. At the other end?

A. Yes, sir; instructions put on there by him. This transfer is taken out of the rate from the billing point to East St. Louis.

Q. Comes out of yours?

A. Comes out of the revenue going to the line to East St. Louis.

Q. Does any revenue come to the C., P. & St. L. from the subsequent handling of the cars after being placed on the designated tracks, these "Y's"?

A. No, sir.

Cross-examination by Mr. HANSON:

Q. Isn't it true that the charges for taking this barley from East St. Louis to St. Louis by the Terminal Association, that charge was absorbed by the C., P. & St. L. in most cases?

A. It is absorbed by the line handling the freight to East St. Louis; it is handled, I understand—that point is governed altogether at the point of origin of shipment.

Q. Since we have got into this we had better make it plain; that applies to shipment in competitive territory, Iowa, Minnesota, and Wisconsin, to St. Louis?

A. Can't recall the points to which it applies.

Q. Wasn't that done to get shipments consigned to St. Louis by way of your line and not by lines that went into St. Louis by the other side of the river; you held out by your line the same as by the other lines—competition for that sort of traffic?

A. I confess it looks that way.

Q. Isn't it so?

A. Can't answer that intelligently because I know nothing about the traffic rates as issued by the C., M. & St. P. I understand that is brought this way, because they get better accommodations through the elevators, and the C., M. & St. P. get a longer haul of the business; more revenue to them.

Q. And it gives the C., P. & St. L. this barley business?

A. Gives the C., P. & St. L. part of it.

Redirect by Mr. WILSON:

Q. Will you tell the master to what point on the C., P. & St. L. the receiver was paid for transporting this barley?

A. They would be transporting it between Peoria and East St. Louis.

238 Q. What part of East St. Louis?

A. Terminus of our tracks.

Q. These tracks you have been speaking of?

A. Yes, sir.

Cross-examination by Mr. HANSON:

Q. This handling of the train after it got there and making delivery of the cars, you paid the Terminal Association for that, did you not?

A. I never paid it; that is in the agreement.

Q. That is in the agreement—fifty cents a car?

Testimony of C. H. Bosworth.

C. H. BOSWORTH sworn.

Direct by Mr. WILSON:

Q. You are the receiver of the C., P. & St. L.?

A. Yes, sir.

Q. When were you appointed?

A. September 21, 1893.

Q. You may state if your attention was called to the fire at East St. Louis on the night of October 28, 1884.

A. Yes, sir; it was; I was notified shortly after the fire was discovered. Went to East St. Louis on the train at seven that morning, going from here.

Q. It appears by witnesses called on behalf of the petitioners that your agent made whatever salvage was made following this fire, and later on that the cars damaged in the fire were repaired in your shops; is that a fact, and, if so, you may state under what understanding or circumstances you did so.

A. I believe the fact is that the wreckage was cleaned up by the St. Louis Terminal Association and in order to clear the tracks as fast as possible and put them in a shape for renewed use; wreckage had to be loaded on cars, which happened to be C., P. & St. L. coal cars; it may barely be, possibly by arrangement with the Terminal Association those cars were furnished them at their request by us, but I can't state that definitely. I think probably the cars were there and convenient for use, and in order to get the stuff out of the way as fast as possible, undertook to run them on our road and on the Jacksonville branch. The matter was done that way by agreement between myself and the Terminal Association, for the purpose of putting the tracks in a condition to be used, and under agreement with them that anything done in connection therewith should

be expressly without prejudice as to our claims as to their responsibility or theirs as to ours.

239 Q. With whom did you make that agreement?

A. Mr. Joseph Ramsey of the Terminal Association, made later on and confirmed in writing.

Q. With whom was the prior agreement made?

A. Mr. Ramsey.

Q. Do you now recall whether you gave your general solicitor any general directions to interview him?

A Yes, sir; I thought it was a step that demanded careful attention, and requested you to take the matter up; and I believe you called on Mr. Ramsey and his attorney, Mr. Watts, in a short time after.

Q. Acquainted with Mr. Ramsey's handwriting?

A. Yes, sir.

Q. I will ask you to look at this letter of November 6, 1894, and state whether that is the signature of Mr. Ramsey and whether you received that from him.

A. Yes, sir; that is his signature and I received it from him.

Q. I will call your attention to this closing sentence of the letter: "I am willing to agree that in removing this property, in order to secure as great salvage as possible from the damaged contents of cars, your action in so doing shall not prejudice you in any manner, so far as this company is concerned. Very truly yours, J. Ramsey." Is that true with reference to what was done in the way of salvage?

A. Yes, sir.

Q. I will ask you to append that letter to your evidence.

(Marked Exhibit 4)

Q. At a later time, when the question of repairing the cars damaged came up, referring particularly to the cars of the C., M. & St. P., you may state under what circumstances, if any, these cars were repaired in your shops, if they were so repaired.

Mr. HANSON: Was that in pursuance of correspondence?

A. Yes, sir; I believe it was.

Q. I will ask you to look at this letter and state whether you received that in due course and whether that was the basis on which you undertook to make whatever repairs were made on those cars.

A. Yes, sir, repairs were made on the cars—any cars that were repaired, it was done after corresponding with Mr. Ramsey and after the receipt of this letter from him.

Q. He states—quoting the last sentence—"While I advise you of our position, I state that your action in repairing shall not be construed as affecting the rights of either party in the premises." Is that so?

A. That was so understood.

240 Q. Append that to your testimony.

(Marked Exhibit 5.)

Q. Did you ever accept any claim based on the losses occasioned by this fire?

(Objection.)

The MASTER: He may answer.
(Exception by intervenors.)

A. So far as I know I never have accepted any claim or paid any claim.

Q. Something has been said here by witnesses for petitioners in reference to certain customs as between certain railroads, referring I believe to the American Railway Association.

Mr. HANSON: I offered a rule of the American Railway Association, with reference to junction reports and deliveries of cars.

Q. In that connection questions were asked of Mr. Beacham, I believe it was, superintendent of machinery and motive power of the C., M. & St. P. as to certain rules and conditions under which connecting lines of railway were to be held liable for delivery on connecting lines of railway. I will ask you to state whether or not there is anything in the rules of the Master Car Builders' Association, or any other association to which your attention has been called as receiver, and that you have accepted as a rule of liability, or imposing liability upon you in the premises.

A. No, sir; I don't think there is.

Q. Mr. Calvert, called as a witness, upon cross-examination, was shown a certain schedule or report made by him in reference to claims against insurance companies; I will ask you under what circumstances you directed that claim to be prepared and to what extent it went.

A. Well, our reasons for preparing that claim against the insurance companies were that it might be held that this loss was ours, and the insurance policy required certain condition to be fulfilled in the way of preparing claims for damage done, within certain days, and we felt it necessary to take those steps out of excessive precaution.

Q. What was the limit within which proof was to be filed?

A. I can't state; perhaps sixty days. Not absolutely certain.

Q. And this schedule was prepared in reference to that clause in the insurance policies?

A. Yes, sir.

Q. In the course of your experience as a railroad man, I will ask you whether your attention has been called to the course of freight business, and particularly in reference to the C., M. & St. P. barley business.

A. To a certain extent it has.

Q. As receiver, I will ask you to state between what points
241 you undertook to haul that barley and between what points you were paid.

A. Peoria and East St. Louis.

Q. What point in East St. Louis?

A. It is difficult for me to state that. I should say in answer to that question that we can't haul it further than the end of our rails.

Q. Where is the end of your rails?

A. At the bridge junction, unless the stuff was expected to be de-

livered at our freight-house or the yard tracks in connection, when it would be delivered to the Terminal Association.

Q. I refer you to a certain blue print offered on behalf of the petitioners, and call your attention to three certain "Y" tracks, upon which it appears from the statement of Mr. Calvert, Mr. Felps and others, these C., M. & St. P. and other cars hauled by you to East St. Louis were delivered, and ask you whether or not you exercised any right of control as a common carrier beyond these three "Y's"?

A. That is the place where all of our deliveries were made to the Terminal Association; our engine would pull the train into those "Y's," and their switch-engine would take it from there.

Q. Who had the care, custody and control after you delivered them on these three "Y's"?

A. The St. Louis Terminal Association, unquestionably.

Mr. HANSON: That is, that is your legal opinion?

A. No, they actually had the cars and custody of the cars; we had no agents to attend to the movement of them, or no engines.

Cross-examination by Mr. HANSON:

Q. You had no terminals there?

A. We have a small terminal on the river front, but no direct connection between the end of our main track——

Q. You have no switch-engine there?

A. No, sir.

Q. So when you bring any train over your line to East St. Louis you have to have them broken up, put on tracks of another company to carry out your duty as a common carrier, and you have made arrangements with the Terminal Association by agreement to do that for you, haven't you?

(Objection.)

A. We have an arrangement with the St. Louis Terminal Association whereby they handle that business for us.

Q. Why did you make that arrangement?

A. On account of the lack of terminal resources of our own.

242 Q. You understand it is the duty of the railway company as a common carrier to have terminal facilities to handle cars at its terminus?

A. I presume it is.

Q. And to carry out that duty you made this arrangement for the use of these tracks and engines at East St. Louis?

A. Either to carry out our duty or increase our business.

Q. Now, you stated that for the purpose of getting these cars which were burned or partially destroyed by fire away from the tracks, and to clear the tracks, you made this agreement with the Terminal Association about removing them and repairing them, and so forth?

A. Yes, sir.

Q. What cars have you reference to; cars you wanted to take away and remove?

A. Reference to all the cars damaged in that yard.

Q. And on what tracks?

A. Can't describe the tracks; brought into East St. Louis by our road, not intending to assist in clearing up other cars.

Q. Intended that to cover such cars as you had brought in over your road?

A. Yes, sir.

Q. That would include the C., M. & St. P. cars and other cars you had brought in there, and to clear up the tracks you had been using, you made that arrangement?

A. Yes, sir.

Q. The C., M. & St. P. or any one of these others parties to that arrangement?

A. Not that I know of.

Q. Controversy between you and the Terminal Association whether these cars were in your possession, or the possession of the Terminal Association, is there not?

A. I don't know whether there is a controversy on that particular point, but there is a controversy as to the responsibility for the loss.

Q. The Terminal Association claiming you are liable and you claiming they are. Now, as a matter of fact or matter of law, the cars, while and although they were on these tracks by the warehouse, as you have stated, still in your possession, if so, it would have been your duty to have repaired those cars or paid for them if destroyed?

A. Not if the responsibility was on the Terminal Association.

Q. I am asking if the cars and contents were in your possession; I am not saying that they were; I am asking if, as a matter of fact——

(Objection.—Asking for a legal conclusion.)

243 Q. Then it would have been your duty to have repaired the cars or paid for them?

A. If you will add: if they were on our rails, I will say, yes.

Q. No; you had no terminals there.

A. Had some.

Q. Not on your tracks that you owned?

A. Not in this fire; no, sir.

Q. If, under the arrangement you had with the Terminal Association, or any custom or practice which prevailed there at this place, you were in possession of these cars—I am not stating that they were—if you were in possession of these cars, you would have settled this damage?

A. No, sir; not in that case.

Q. Why?

A. Because, in my opinion, they are responsible.

Q. You made an agreement with the Terminal Association for the use of certain tracks, didn't you?

A. Yes, sir.

Q. That was done because you didn't have tracks to break up trains and put cars on?

A. That is one reason.

Q. Now, regarding these as your tracks in that view—I don't say they were—and you had not yet delivered a waybill or made delivery of these cars to the Terminal Association, then you would have paid for these cars, wouldn't you?

(Objection.)

A. No, I will be frank with you; I will answer and say that I would not have paid for the cars. You are not asking for my opinion as to the legal status. If you are asking what I would have done, I will say distinctly, I would not have paid for the cars.

Q. It is a custom between all railroads, if a car of the St. Paul railway is destroyed on your track, you pay for it?

A. Yes, sir.

Q. And that is on the ground that you have possession of the car, and in accounting for the loss of it you account to the owner and pay for it; that is a well-understood custom, isn't it?

A. Yes, sir.

Q. If these cars destroyed were on tracks you had regarded as yours in the conduct of business here, you would say that rule applied?

A. I don't.

Q. But you claim that they were not in your possession, not on your tracks, and therefore you say you are not liable?

A. Yes, sir.

Q. How would it have been, supposing those cars had been left on the "Y," by your engine, as the train came in?

244 A. The situation would have been precisely the same.

Q. So, if a car had been destroyed by fire there, you would claim the association liable?

A. Yes, sir; you understand those tracks were not devoted exclusively to my use.

Q. I understand for the use of all trains. Would it make any difference in your opinion, if the custom was at East St. Louis that the Terminal Association never would move a car or make a delivery of a car until they got a waybill from your agent, and no waybill had been given for any car in controversy?

A. I think not.

Q. Then you based your opposition to these claims entirely on the fact that these cars, when they arrived at East St. Louis, had been in the train in which they came, were broken up by the Terminal Association, and put on tracks under your agreement?

A. Base our views on this, that the Terminal Association doing that work was conducting the operations, and that they had the right; as much a part of their duties as a common carrier.

Q. As shippers of this barley, you were bound to provide facilities at East St. Louis?

A. Don't know.

Q. Don't you think you were?

A. I know short of facilities at a great many places.

Q. Do you think you can get rid of the responsibility?

A. Don't know.

Redirect by Mr. WILSON:

Q. Referring to this agreement, did you make that originally?

A. I did not; this agreement was in effect when I took the road.

Q. Ever enter into any arrangement with reference to an agreement, directly or indirectly, after you came in charge?

A. No, sir, except in reference to the modification of the agreement after the fire. I think the Terminal Association wanted it distinctly understood they were not to be responsible for future fires.

Mr. HANSON: So you had operated under this up to the time of the fire?

A. So far as I know.

Q. Were you consulted as to the particular tracks used by the Terminal Association in storing and handling these cars?

A. Don't understand we were.

245 Q. Did you have control or direction?

A. None whatever, except that they recognized our orders as to further movements of the stuff.

Q. You considered your duty fully discharged as a common carrier when you delivered these cars on these "Y's" to the Terminal Association?

A. Yes, sir.

Q. I understand from Mr. Calvert that this agreement, so far as the practical administration is concerned, particularly so far as charges are concerned, has been modified. Were you ever consulted by the Terminal Association as to the modification of this agreement?

A. No, sir.

Q. I am requested to ask you whether the insurance companies accepted your claim?

A. No, sir, they haven't.

Q. Under what arrangement as to terminal facilities is your business transacted at Peoria?

(Objection.—Entirely incompetent, immaterial and irrelevant to the issue.)

The MASTER: I don't see its pertinency.

Q. The witness, Beacham, stated in the course of his examination that this business of the Chicago, Milwaukee and St. Paul was delivered to the Rock Island and Pacific, and they hauled it to Peoria and turned it over to the Peoria and Pekin Union railway, who delivered it to us. Now, I want simply to show by Mr. Bosworth the relations of the Peoria and Pekin railway to the C., P. & St. L. at that end, and the circumstances under which we received this business, when our liability began.

(Objection.)

The MASTER: You have a right to show continuous passage, but I don't know that custom has anything to do with it.

Q. And I desire to show that the Chicago, Peoria and St. Louis railroad is one of the proprietary lines of the Peoria and Pekin

railway, in connection with several other railroads, and then ask the witness whether, if these cars had been burned upon the tracks of the Peoria and Pekin Union railway, under the custom by which the business is done, he would be held himself responsible; and the further fact, I expect to show by the witness, that the Peoria and Pekin railway is an association similar in objects, organization and operation with that of the St. Louis Terminal Association.

(Objection.)

The MASTER: I don't think your proposition is broad
246 enough. If you expect to show that such is a custom, that is another thing; but if you are going to show a custom of the Peoria and Pekin Union railway, I don't think it is pertinent to this investigation at all.

Q. I expect to show not only what the custom there is, but that the custom at Peoria is precisely what prevails at St. Louis and other important terminals in the union, and that we do at St. Louis and did there precisely what we did on receiving property at Peoria, and what other railroads did.

The MASTER: If you are going to establish a common custom, the question may be answered.

Q. The question is as to the arrangements under which, and the methods under which your business is handled at the Peoria terminal, where you received this particular business from the Chicago, Milwaukee and St. Paul, and where your liability began?

(Objection, as incompetent and immaterial, asking the witness for a legal opinion; objection, and exception.)

A. The arrangement was under a contract, a written contract, between the Peoria and Pekin road on the one side and ours, as successors to another railroad company, party of the second part, and under that contract they furnish certain terminal facilities for us and trackage between Peoria and Pekin, Illinois. The methods under which this particular business is handled are that the Rock Island and Peoria Railroad Company would deliver a car of barley destined to East St. Louis on the Peoria and Pekin Union tracks in the city of Peoria, set aside for that class of transfer business, and the Peoria and Pekin switch-engine would put it into our train, and while there is some dispute as to that point I think it is well settled and admitted that the Peoria and Pekin road is responsible for loss, especially by fire or a wreckage, after such cars or property were transferred, or during the performance of the switching, from the Peoria and Pekin tracks to our train.

Q. Your liability began then when the cars were turned over to you and ties onto your engine?

A. Yes, sir.

Q. Are you acquainted with the relations of the Terminal Association at Chicago, Indianapolis, Louisville and Cincinnati, if there are any such associations, to the lines doing business over them, and if so, the custom under which business is done between the tenant or

proprietary lines and the Terminal Association itself; where is the point of liability as between the Terminal Association and tenant or proprietary lines?

(Objection.—Improper, immaterial and irrelevant as to what the practice is at other points. Not for the witness to determine the point where liability begins or ends, but for the master and the court; objection and exception.)

247 A. My answer is that the Terminal Association in railways of the class you have mentioned, as to such the beginning of liability on the part of such roads and association is, when the cars are burned on their rails or in their custody, and it would end with respect to the Terminal Association when the delivery back again is made to the same line.

Cross-examination by Mr. HANSON:

Q. Isn't it a universal custom whenever there is a car delivered from one company to another, consigned to a point beyond, before that car is taken by the company to which it is delivered and moved on to its destination, a waybill accompanies that car and is delivered to the delivering company?

A. I can't say it is a universal custom.

Q. How would the moving company know what to do with a car, without a waybill?

A. Might take the direction of the agent. I will state it is undoubtedly generally the case.

Q. And at all junction points are not junction reports made by the company delivering the car, made to the company owning the car?

A. Very generally; yes, sir.

Q. The testimony here is, as to the cars in controversy, you furnished no waybill or junction report.

Mr. WILSON: How could there be any if the cars were burned up?

Q. Do you consider that at all in determining when the liability of one company ends and the other attaches?

A. Not to a very great extent—not at all, if the car itself has been actually turned over, accepted and handled.

Q. Set on the track awaiting a waybill, would you consider the company making that delivery had the same control over it and the same direction?

A. Yes, sir.

Q. Until this direction had been given by means of the waybill there would not be a complete delivery?

A. I will say in answer to that, there has been some effort made to agree upon that as a dividing line, but it has not been agreed upon so far as I know, and is not a controlling factor in the case, the delivery of the waybill; I don't think that could be taken at East St. Louis as settling the question.

Q. Better leave that to the court.

A. I thought you were asking about the practice of railroads.

Mr. WILSON: He was asking about that, and the reason is, goes upon that theory.

248 Q. Do you know, at East St. Louis it appears, when a train comes in and is broken up and the cars put on the tracks set apart; do you know those cars would stand there till you deliver a waybill to the Terminal Association?

Mr. WILSON: Call your attention to the fact, he claims under a particular agreement, and that pursuant to it certain tracks were set aside; isn't it the fact that no tracks were designated?

Q. I am speaking of tracks commonly used.

A. I would like to be frank with you in answer to these questions. My belief is no particular tracks were specially set aside and our business confined exclusively to them.

Q. Don't claim any exclusive use. Those tracks commonly used, witnesses say.

A. I don't understand we had any control over them; if it suited their convenience to move them into the other corner of the yard they would have done so.

Q. Wouldn't have moved them to their destination until they got a waybill?

A. Not till they got instructions.

Q. They would still be held there?

A. Yes, sir.

Q. So they were subject to your order to that extent?

A. Yes, sir.

Redirect by Mr. WILSON:

Q. Subject to your order or the order of the consignee?

A. Well, I would answer that by saying, the St. Louis Terminal Association up to that point would not have recognized any order the consignee would have made directly to them and we would not have attempted to make a movement without the consignee who would order through our agent in East St. Louis.

Mr. HANSON: And you would deliver to the Terminal?

A. Yes, sir.

Q. Was that a part of your contract shown by the waybills offered now here by which you undertook to transport these cars as part of the through line from Wykoff to East St. Louis, or was it for the convenience of the consignee and in accordance with the understanding between the Terminal Association and yourself that the cars were to stand there until such time as the consignee should communicate what particular point they desired the cars to be delivered to?

A. What do the bills of lading say?

Q. From Wykoff to East St. Louis with the name of the consignee in St. Louis.

A. I should say that without any special understanding of
249 knowledge about the business, our agent would naturally have taken the cars or had them eventually brought on the

transfer tracks, which would be near our freight-house in East St. Louis. It was known in all these cases the cars were subject to movement by rail by some railroad company and put in this yard convenient for that additional movement.

Q. Was that separate and distinct, or was it a part of the original contract by which you undertook the freight?

A. I should say not a part of the original contract; the contract provided for transportation to East St. Louis. We had fulfilled that part of it and we had discharged our obligation.

Cross-examination by Mr. HANSON:

Q. Why did you pay part of the charges for taking over the bridge if you had not contracted to take it over to St. Louis; you paid part of the charges didn't you?

A. I am not certain about that, but I think the understanding was, the rate was classed to St. Louis and East St. Louis and none of those charges on any of the cars at St. Louis.

Q. Of course those had not been taken over, but cars that had been taken there you had contracted as to the charges?

A. I presume we had.

Redirect by Mr. WILSON:

Q. Anything you wish to add?

I will ask you, as some reference has been made to the Master Car builders' rules, question asked Mr. Beachman as to the course of a practice in business and Mr. Beacham said he was a member—whether there is anything in the rules as you understand them, or as they have been communicated to you, that impose any obligation upon you?

A. Well, in the first place my understanding of the Master Car-builders' Association is that it is an association for educational purposes primarily, and that its rules and regulations are in the shape of recommendations, and I do know that either the articles of the constitution of the association or the by-laws particularly state that their rules, findings and conclusions shall not be binding upon the members of the association; in reference to membership in the association on the part of the C., P. & St. L. I will say that the corporation, the C., P. & St. L., prior to my connection with it as receiver, as I understand it, was a member of the Master Car-builders'
Association, but as receiver and since the receivership there
250 has never been any new membership taken out for the receiver, neither have we denied our membership in it, since our connection with it, if we have any.

Q. Did you propose to put in a copy of the rules?

Mr. HANSON: No, sir.

Cross-examination by Mr. HANSON:

Q. I will ask the witness if since he has been receiver he has not submitted questions under the rules of the Master Car-builders' Association.

A. No, sir; to the best of my knowledge none have been submitted by the receiver.

Q. By the employés or officers of your company?

A. Not affecting disputes arising since the receivership. I know some cases have been passed upon by the committee on arbitration. Those cases, however, were cases which happened prior to my appointment. If any since September, 1893, I don't know.

Q. But claims arising prior have been submitted since your receivership?

A. I think probably that is so.

Redirect by Mr. WILSON:

Q. I will ask you to state what the rule is, as you understand it, in the Car-builders' Association as to liability for cars destroyed?

Mr. HANSON: The rule itself is the best evidence.

The MASTER: If there is such a rule I should think it would be the best evidence.

Q. Not prepared to say that there is, but I propose, either this evening or in the morning, to offer the last publication of the Master Car-builders' Association, and I think it will be found that that is the rule; but it may not be so, and in that case I will ask the witness the question. I will ask if there is such a rule, and if he knows what the rule is as to liability?

A. There is a rule in the Master Car-builders' code of rules.

Q. Have you a copy of the rules?

A. I can get a copy.

Q. I will ask you to do so, to read out of the rules that one and make it a part of your evidence?

Adjourned to 9 o'clock a. m.

251 *Testimony of Bluford Wilson.*

BLUFORD WILSON, sworn.

Direct by Mr. WARREN:

Q. State your name and profession?

A. Bluford Wilson, attorney-at-law.

Q. What connection have you with the Chicago, Peoria and St. Louis railway or its receiver?

A. I am vice-president of the Chicago, Peoria & St. Louis Railway Company and its general counsel, and I am solicitor for the receiver of the Chicago, Peoria & St. Louis, and have been since the receivership was instituted in September, 1893.

Q. State what you know about the removal of the wreckage and the salvage of the fire at East St. Louis, October 28, 1894.

A. My attention was called to the fire by Mr. Bosworth, the receiver, who invited me to a conference with him upon the subject. The details of the losses and their extent had been mainly received, and we recognized at once that our little company—that the owners of property lost or damaged—that a disaster of more than ordinary

magnitude had happened. This conference was held soon after the fire occurred, some time in the month of October or about the first of November, and as the result of the conference I was instructed by Mr. Bosworth to proceed to St. Louis and confer with Mr. Ramsey as to the best method of dealing with the salvage if there was any to be made, and with the subject of repairs to cars and so forth. I met Mr. Ramsey at his office in St. Louis, and without going into all the details it is enough to say we both recognized that the disaster was one of more than ordinary magnitude, and without admitting upon either side the liability of our respective companies, he on his part expressly disclaiming any liability on behalf of the Terminal Railroad Association, and I on behalf of the receiver, with equal directness and emphasis, disclaiming any responsibility whatever on the part of the receiver, we agreed that in the interest of the owners, and in the interest of all parties who had suffered loss by the fire, the proper thing to be done was to at once proceed to make whatever salvage could be made, and mitigate by all the means in our power the extent of the loss or damage; after some further conference as to the relations of the two companies, it was agreed in substance, as shown by the statement of Mr. Bosworth on yesterday and as shown by Mr. Ramsey's letters, that he on his part would handle the wreck at East St. Louis in connection with our employees, and that it would be absolutely without prejudice or
either side. This arrangement was made for the reasons I
252 have stated, and I hope in a large and proper spirit, for the
protection of the property of those with whom we were dealing; leaving the question of ultimate liability, as between the Terminal Association and the receiver, to be determined by the courts upon the evidence and the law of the case.

Testimony of W. H. Calvert.

Mr. CALVERT, recalled.

Direct by Mr. WILSON:

Q. You stated yesterday, in the course of your examination, as to these barley shipments coming to us over the C., M. & St. P. railway, and probably as to certain other classes of property, the shipments in question were permitted to stand in the yards at East St. Louis all the way from two hours up to four weeks or more; I will ask you to explain how this happened.

A. Well, the class of freight allowed to stand there consists of grain, barley in particular, hard coal, pig iron and salt and other commodities that are held on what we term the market; in other words, forwarded there, not in all cases but as a rule, held for the accom-odation of the consignee, which is virtually for the interest of the shipper; the business being held on commission to await an advance of the market; in other words, it comes in there, and if the market is all right when it arrives, they sell it immediately, but as a rule hold it until the market suits them. It is in other words a port of entry for that class of goods at St. Louis.

Q. And is so held to await the state of the market for the accommodation of the consignee?

A. For the accommodation of the consignee, which is virtually accommodation for the owner, it being handled on commission.

Q. How long has this barley business been carried on, and how long had that custom of shipment been in operation in East St. Louis?

A. Well, since the C., P. & St. L. opened business in East St. Louis, which was in the winter or early spring, December or January, 1891; I can't say whether any barley was handled that spring after they opened or not. I was connected with the company as cashier, commencing May, 1891, and until about the first of November, 1891, and there was considerable, although I am not able to say how much, arrived there during the fall. The next April I went back there as agent, and the barley business in particular has been one of our largest commodities that we have handled every season since.

253 Q. Where has this barley been sold, as a rule?

A. As I stated the other day, ninety per cent. of it is sold to consignees in St. Louis, and the balance of it—I wish to correct that last statement—not sold to consignees, but to various firms in St. Louis by the consignees; the balance of it sold to various parties in and about St. Louis. The consignees have representatives who make regular trips to the various yards in and about East St. Louis daily for the inspection of this grain, and samples are secured from the cars and taken on 'change, or on the board of trade, if you choose, and there the grain is sold by sample; unless in some cases where a sale is made and a certain grain is guaranteed, and in that case, as I said yesterday, that is barley that goes straight through without stopping.

Q. I understand you to say these inspecting agents are agents of the consignees?

A. Agents of the consignees; that is, the firms to whom the barley is consigned in the body of the waybill—commission.

Q. Do you know the firm of Teichman?

A. Yes, sir.

Q. Teichman & Company; what is their business?

A. Grain and commission business.

Q. Do they observe that course of business you have referred to in reference to barley shipments?

A. Yes, sir.

Q. What proportion of the barley went through that firm?

A. I should say that the Teichman Commission Company handled fifty per cent. of all the barley that had arrived the last season on our line.

Q. If you know, please state whether or not the C., M. & St. P. people either through their freight department or through the department of administration, knew of the course of business at St. Louis in reference to these shipments; and if so, your means of knowledge of the knowledge they must have had as to the course of business—bills of lading or waybills——

Mr. HANSON: If they had, waybills would show it; better let the waybills speak.

A. I can't answer that; in fact, I don't know whether they are familiar with the manner of handling the business or not. I presume they might have been, because it has been running so long.

Q. The name Teichman & Co. appears on some of the waybills—possibly some of the bills of lading, copies of which have been put in evidence; by whom was that name placed there?

A. Well, the waybills—placed there by the agent of the Chicago, Milwaukee and St. Paul Railroad Company; as to bills of
254 lading, I cannot answer; bills of lading generally made out by the shipper and receipted by the company's agent receiving the goods.

Q. Teichman & Co., a well-known firm?

A. Yes, sir.

Q. Any means of knowing as to whether well known in the region of country where the C., M. & St. P. gets freight?

A. No means, I presume, except through their reputation as a large firm or commission-house.

Q. Number of shipments?

A. Well, that is pretty hard for me to say.

Q. How does it compare with other houses in St. Louis?

A. Well, the Teichman Commission Company, I would say, ranks equal if not ahead of all the grain commission firms.

Q. I ask you if the Orthwein Company is a grain commission firm?

A. Yes, sir.

Q. Do they transact in the same way?

A. Yes, sir.

Q. Who is the firm of L. Lenke & Co.?

A. They are engaged in the same business.

Q. Manage their business in the same way?

A. Yes, sir.

Q. As far as inspecting the grain and so forth and sales?

A. Yes, sir.

Q. What you have stated there is the general custom with other merchants handling these barley shipments?

A. Yes, sir.

Q. You may state whether you have prepared from the records of your office or from other sources a memorandum of cars burned in the fire of October 28, 1894, showing the date when they were received?

A. Yes, sir.

Q. The date when they were received at East St. Louis?

A. Yes, sir.

Q. I will ask you to look at that memorandum and state whether that covers that?

A. That is a correct statement as far as it goes, but it does not include some of the cars which were burned; does not include the hard-coal cars.

Q. Does it include all in this controversy of the C., M. & St. P., or these grain cars?

A. Yes, sir; my best recollection is that it included everything in that fire destroyed loaded with barley.

Q. This memorandum states correctly, does it, the date of the arrival and deposit of the cars on the Y's in the yard of the Terminal Association at East St. Louis?

255 A. Yes, sir.

Q. I will ask you to attach that to your testimony.

(Objection as incompetent and irrelevant to these issues.)

Q. Do you object to it on the ground that it is a copy?

Mr. HANSON: No.

(Paper marked "Exhibit 6.")

Cross-examination by Mr. HANSON:

Q. When waybills were made out by the receiver at East St. Louis for barley consigned to St. Louis and other points to which the Terminal Association was to take it, where were the waybills made out, at your office?

A. Yes, sir.

Q. Delivered by your office to the Terminal Association?

A. Yes, sir.

Q. That would be waybills of all cars going to some other points than East St. Louis?

A. Yes, sir; except such as were to go to the Wiggins ferry, in which case the waybills would be delivered to the Wiggins ferry.

Q. None of the cars in controversy here, barley, went by the way of Wiggins ferry?

A. No, sir.

Q. Did you know that Teichman and Company and Orthwein and Company were merely acting as commissionmen for the sale of the barley?

A. Didn't know it until after this trouble came up; the way I found out was under the arrangement between the C., P. & St. L. and the Terminal Association as to the care of the salvage—called on Teichman Commission Company to interview them——

Q. If you didn't know it prior to the fire that is all right.

Mr. WILSON: I think he has a right to explain.

A. I went to them with a view of having them handle the salvage of the barley in the cars damaged. They wouldn't take hold of it on account of the shipper; stated they were merely handling the business on commission, and without the shippers would authorize them to handle it on their account, they would only handle it for the good of whom it might concern, and under that arrangement we placed the salvage in their hands.

Q. Did the receiver pay the commission for the sale of this salvage?

A. Commission deducted from the proceeds of the sale.

Q. So he accounted to you for the salvage?
A. No, sir; he accounted to the shippers, on the ground, better get a half loaf than none at all, with my consent.

256 Redirect by Mr. WILSON:

Q. In my questions yesterday, if I didn't particularly ask you as to the cars covered by this schedule, which you have this morning appended to your testimony and which covers their date of arrival at East St. Louis, I now ask you whether or not you desire to have it understood that your statement as to the care, custody and control of those cars, from the dates of their deposit on the three Y's marked on the blue print, being in the Terminal Railroad Association, applies to this list?

(Objection.—Incompetent, immaterial and irrelevant and asking for the witness' conclusion as to a legal liability, or which company had legal possession of cars; that is for the master and the court and not for the witness to say.)
The MASTER: I admitted the others; I will admit this.
(Exception by intervenors.)

A. I think my statement of yesterday answers that point.
Q. Do you apply it to these cars?
A. As far as the physical control, care and custody is concerned.

Mr. WILSON: I now desire to state to the master that this is all the evidence I am prepared to offer this morning. Since the adjournment last night I have taken steps, by telegraphing through our agents at East St. Louis, to ascertain the whereabouts of the witness Malone, and I am advised that he left East St. Louis on Monday of this week to go to the State of Indiana, in response to a telegraphic summons stating that his mother was sick. He is employed at East St. Louis, and will probably be back in a week, after which time I have no doubt I shall be able to secure his personal attendance as a witness. As to the witness Keemer, who was here yesterday, in the employ of the Bluff line, and had to leave to take a train out, I have been unable since yesterday to speak with Mr. Fuller, the general superintendent, as to the day when he can spare Keemer. I will settle that at our conference and get his attendance probably within eight or ten days, or about the same time that I can secure the attendance of Malone. I am also advised of other testimony from St. Louis, additional, and which has been discovered since yesterday. For these reasons I ask the master to adjourn this hearing until the twenty-fifth day of September. I would name an earlier date than that, but I am imperatively required to be in New York from the tenth to about the twentieth, and the twenty-fifth is the earliest day I can certainly promise to go on.

Mr. HANSON: This is a great disappointment to us. We have been trying and trying to get this matter to a hearing;
257 spoiled my summer vacation; and I don't think since I have consented that the statements of these witnesses should

be received as evidence, that there ought to be a further continuance to receive their testimony.

The MASTER: But the Major states that he has additional evidence.

(Further hearing postponed, provisionally, that is unless some other date named, to October 2, 1895.)

(Here follows diagram marked p. 257.)

258 EXHIBIT 4.

Letter from J. Ramsey, Jr., to C. H. Bosworth.

ST. LOUIS, *Nov.* 6, 1894.

Mr. C. H. Bosworth, gen'l mngr. C., P. & St. L., Springfield, Ills.

DEAR SIR: Will you kindly arrange for clearing the tracks, which have been occupied by you as a yard at East St. Louis, and are now blocked by the burned and damaged cars belonging to your company, or in your possession at the time of the fire? We desire to repair the tracks as soon as possible.

I understand from you that you are willing to remove the burned and damaged cars and contents, without delay, providing that by so doing you do not waive any rights which you may have, or claim to have, to hold this company responsible for the loss resulting from the fire.

I am willing to agree that in removing this property, in order to secure as great salvage as possible from the damaged contents of the cars, that your action in so doing shall not prejudice you in any manner, so far as this company is concerned.

Very truly yours, J. RAMSEY, JR.,
General Manager.

EXHIBIT 5.

Letter from J. Ramsey, Jr., to C. H. Bosworth.

ST. LOUIS, *February* 7, 1885.

Subject: Cars destroyed at East St. Louis.

Mr. C. H. Bosworth, receiver & general manager C., P. & St. L., Springfield, Ills.

DEAR SIR: I beg leave to acknowledge receipt of your favor of January 31st, in which you advise me that you will proceed to make certain repairs on cars damaged by fire at East St. Louis, but that you will hold the Terminal Railroad Association responsible for the cost of such repairs.

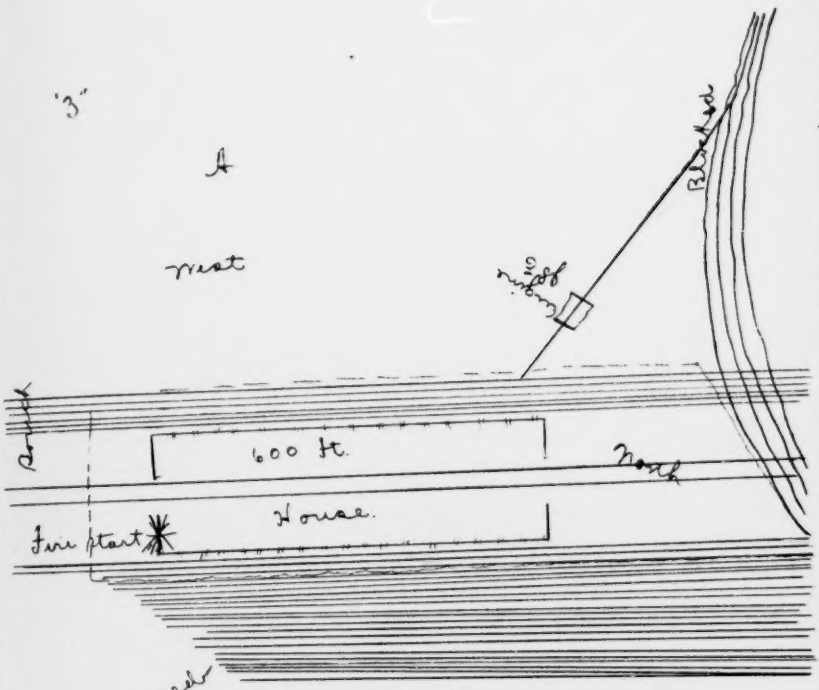
In reply to this notice I beg to advise you—as I have heretofore done—that this company denies any responsibility whatever for any damage occurring to cars while in your possession at East St. Louis, either by fire or otherwise, and we deny that these cars were in the

1866

"3"

A

West



Keener. Conductor

No 285
Rau
&
Bosworth
} R. 25

possession of the Terminal Railroad Association at the time the damage was received.

While I advise you thus of our position in the matter, I desire to state that your action in repairing these cars shall not in anywise be construed by this company as affecting the rights of either parties in the premises.

Respectfully,

J. RAMSEY, JR.,
General Manager.

For insurance file.

259 EXHIBIT 6.

Date of Arrival of Cars.

Number.	Initial.	Date.	Time of arrival.
37506	C., M. & St. P.	10-27	6.40 p. m.
12336	C., M. & St. P.	10-26	12.30 p. m.
2598	C., M. & St. P.	10-25	1.45 p. m.
4126	C., M. & St. P.	10-25	1.45 p. m.
3728	C., M. & St. P.	10-26	12.30 p. m.
18126	C., M. & St. P.	10-26	12.30 p. m.
10720	C., M. & St. P.	10-26	12.30 p. m.
6842	C., M. & St. P.	10-26	12.30 p. m.
36088	C., M. & St. P.	10-26	12.30 p. m.
4268	C., M. & St. P.	10-26	12.30 p. m.
7552	C., M. & St. P.	10-26	12.30 p. m.
1100	C., M. & St. P.	10-27	7.55 a. m.
15254	C., M. & St. P.	10-24	5.00 p. m.
32986	C., M. & St. P.	10-25	1.45 p. m.
20022	C., M. & St. P.	10-25	1.45 p. m.
680	C., M. & St. P.	10-10	5.45 p. m.
10814	C., B. & Q.	10-25	1.45 p. m.
11962	C., B. & Q.	10-25	1.45 p. m.
14385	C., B. & Q.	10-25	1.45 p. m.
1919	C., B. & Q.	10-25	1.45 p. m.
20975	St. L., B. & S. I.	10-28	6.55 a. m.
1004	R. I. P.	10-28	2.57 p. m.
12611	C., C., C. & St. L.	10-27	7.55 a. m.
3433	C., N. O. & T. P.	10-26	12.30 p. m.
38108	C. M.	10-26	12.30 p. m.
1154	M. & N.	10-27	7.55 a. m.
43064	C., M. & St. P.	10-25	1.45 p. m.
43222	C., M. & St. P.	10-25	1.45 p. m.
11836	C., M. & St. P.	10-28	1.45 p. m.
33090	C., M. & St. P.	10-28	1.45 p. m.
34574	C., M. & St. P.	10-25	4.00 a. m.
32194	C., M. & St. P.	10-26	2.45 a. m.

Date of Arrival of Cars—Continued.

Number.	Initial.	Date.	Time of arrival.
43030	C., M. & St. P.....	10–25	4.00 a. m.
12	C., M. & St. P.....	10–25	1.45 p. m.
178	M. & N....	10–24	5.00 p. m.
7286	C., M. & St. P.....	10–24	5.00 p. m.
16802	C., M. & St. P....	10–25	8.20 p. m.
46648	C., M. & St. P.....	10–24	5.00 p. m.
2430	C., M. & St. *Y*.....	10–25	4.00 a. m.
3218	C., M. & St. P....	10–27	7.55 a. m.
3524	C., M. & St. P.....	10–26	6.30 p. m.
260			
6364	C., M. & St. P.....	10–28	6.55 a. m.
10071	C., M. & St. P.....	10–16	3.45 a. m.
10536	C., M. & St. P.....	10–27	7.55 a. m.
12886	C., M. & St. P.....	10–28	6.55 a. m.
15944	C., M. & St. P...	10–28	6.55 a. m.
16502	C., M. & St. P.....	10–25	1.45 p. m.
17272	C., M. & St. P.....	10–27	7.55 a. m.
31098	C., M. & St. P.....	10–27	7.55 a. m.
31204	C., M. & St. P.....	10–27	7.55 a. m.
33134	*B.*, M. & St. P.....	10–27	6 40 p. m.
34908	C., M. & St. P.....	10–25	4.00 a. m.
46992	C., M. & St. P.....	10–27	7.55 a. m.
1232	C., M. & St. P.....	10–25	4.00 a. m.

Statement by Mr. Wilson.

On Wednesday, October 2, 1895, pursuant to adjournment, before Stuart Brown, master in chancery of the United States court for the southern district of Illinois, reappeared the parties in the intervention by the Chicago, Milwaukee & St. Paul Railroad Company and others, intervenors represented, as before, by Messrs. Hanson and Cary, and the receiver by Messrs. Wilson and Warren; when the following further proceedings were had, Volney Hickox acting as stenographer:

Mr. WILSON: I regret to say, your honor, that we have not been able to obtain the testimony of Teichman and others in St. Louis for today, as we had anticipated, and I am therefore reluctantly compelled to ask for a further continuance. We have up until last night had every assurance from these witnesses that they would be present today. These assurances were given to Mr. Poland, our commercial agent at St. Louis, and were based upon provision made by us for the expenses and transportation of these gentlemen. They reside outside the district in St. Louis, and hence cannot be reached

by subpœna. Relying upon their assurances—and they are all men of repute and good business standing and character in St. Louis—that they would be personally present and give us the benefit of their testimony, we took no steps to take the depositions of the witnesses.

We expect to prove by these witness- that the St. Louis Terminal Railroad Association personally solicited this particular barley business, originating on the Chicago, Milwaukee and St. Paul road, on which this controversy is pending; that these solicitations by the Terminal Railroad Association were made to all the barley dealers in St. Louis, to whom the particular consignments of barley are made, which are now in litigation; that the Terminal Railroad Association, as an inducement to barley dealers and shippers,
261 agreed to hold the cars on their tracks at East St. Louis free of car service, and offered other facilities in and about their yards at East St. Louis, by which the St. Louis Terminal Railroad Association succeeded in securing the business of all of the shippers; by that term, I mean the consignees and shippers except the business of the John Wall Commission Company, whose business was being handled by the Wiggins Ferry Company, a competing line with the St. Louis Terminal Railroad Association, and that at a later day they also secured the business of this last-named firm. And that the solicitation was made in the interest of the Terminal Railroad Association, for the express purpose of having the business sent down the east side of the Mississippi river, so as to give them the benefit of the transfer across the river from East St. Louis to St. Louis, in competition with lines west of the Mississippi river.

We believe that on an adjournment of one week from this day we can secure the depositions of these witnesses, and will do so, and for these reasons, so far as the absence of the testimony of the witnesses from St. Louis is concerned, we move your honor for an adjournment for the purpose of taking the depositions of these witnesses at St. Louis on such a day as may be most convenient to the master and to opposing counsel.

We also find it necessary to ask an adjournment by reason of our failure to secure a proper stipulation from opposing counsel, covering the testimony of the agents of the Chicago, Milwaukee and St. Paul railroad, at the various points where this freight was consigned; and also the testimony of the shippers themselves, covering the important fact of the assent of the shippers to the stipulations in the waybills or bills of lading, all of which contain express provisions against liability for loss by fire, after the arrival of the goods at their destination.

We expect to show, by the testimony of the shippers and of the agent that this business was a large business; had been carried on for years, and that all the details, including of course, the important detail of notice of the particular stipulations covered by the waybills and the assent of the shipper thereto, were known and agreed to.

I think this testimony is important and material, and we hope to

be able to secure it within a reasonable time, if such opportunity is given us.

We had hoped, although we were late in making application to Mr. Hanson, that we would be able to obtain the stipulation from him of the assent of the shipper to the contents of the contract of carriage.

Mr. HANSON: We oppose this continuance, of course, and I
262 think properly and rightfully so. There has been an adjournment for fully a month to enable the receiver and his attorneys to prepare their testimony for this hearing. I think that is ample time to have done something in that direction.

Now in reference to the testimony of people at St. Louis, in respect to the arrangement made by the Terminal Railroad Association, by which it would hold these cars of barley and so forth, rather than to postpone this hearing at this time, I will consent that the witnesses, if here, would testify as Mr. Wilson has stated. So I do not think a continuance should be granted on that application.

In regard to the other part of the application of getting the testimony of the agents of the company, at various points where shipments originated, and of the shippers at those points, I do not think the application should be granted upon that. There is no diligence shown to secure this testimony, and your honor has no assurance that any such testimony can be had. In reference to the stipulation, I was only asked—hardly intimated—whether I would stipulate or not; received the letter yesterday morning. I immediately inquired about the facts, with reference to this part of the request, and I am willing now to stipulate what the facts are, and I will do that for the purpose of avoiding a continuance of this hearing.

So I think under the circumstances, where counsel have had so much opportunity of getting this testimony from the agents and the shippers and this testimony at St. Louis, it is hardly fair to the parties that a continuance should be had, especially when I am willing to concede that the witnesses at St. Louis, if here, would testify substantially as Mr. Wilson has stated he expects to prove by them. Certainly no diligence can be shown, with respect to the witnesses at St. Louis, nor more especially as to procuring the testimony of the St. Paul Company's agents.

Mr. WILSON: I don't think that is fair; we used all possible diligence as to the persons at St. Louis.

Mr. HANSON: Well, with regard to the agents.

Mr. WILSON: There may be some reason there.

Mr. HANSON: There is nothing shown here, that he can make any other arrangements that will secure their attendance.

Mr. WILSON: My intention is to take the depositions.

Mr. HANSON: Go to St. Louis?

Mr. WILSON: Yes, sir.

Mr. HANSON: For the purpose of expediting this hearing, I am willing to concede, if the witnesses were here, they would testify substantially as has been stated.

Mr. WILSON: What stipulation are you willing to make with reference to shippers?

263 (At this point an informal conference intervened, the conclusion announced as follows:)

Mr. HANSON: To expedite matters, it is stipulated that the witnesses, Otto Teichman, Henry Grieve of the John Wall Commission Company, L. Lemke and Charles Orthwein, at St. Louis, if present, would testify substantially as has been stated by Mr. Wilson.

I would like now to introduce a little testimony. Under the stipulation which was entered into between the parties, filed August 27, 1895, in reference to the claim of the C., M. & St. P. Railway Company, for the value of the cars lost in the fire, it was stipulated that each one of the cars was consigned as per bill of lading and waybills introduced in evidence. A portion of such bills of lading and waybills have been introduced in evidence in behalf of the claim of the C., M. & St. P. Railway Company, and I now offer in evidence the remainder of such station receipts or bills of lading and waybills, in pursuance of the stipulation and in behalf of the claim of the C., M. & St. P. Railway Company. If bills of lading are obtained hereafter, covering these same shipments, they may be offered in evidence in place of or in connection with the station receipts which are now put in evidence.

Mr. PHELPS recalled.

Direct by Mr. HANSON:

Q. When you were on the stand before, in going through the list of car numbers, I see I have omitted to ask you in reference to C., M. & St. P. cars, numbered fifteen thousand two hundred and fifty-four; one hundred and seventy-eight; seven thousand two hundred and eighty-six; forty-six thousand six forty-eight; twelve thousand six hundred and eleven; and three thousand four thirty-three; whether any waybill had been delivered to the Terminal Association by the receiver of the C., P. & St. L., or his agents, covering these cars, or whether any such waybill had been received by the Terminal Association for any of these cars prior to the time of the fire at East St. Louis.

A. No, sir; no waybills received.

Q. For any one of these cars mentioned?

A. No, sir.

Q. You have made examination?

A. Yes, sir; I looked at the records.

Q. And you find no waybill has been received covering any one of these cars mentioned?

A. No, sir.

264 *Testimony of G. W. Phelps.*

Cross-examination by Mr. WARREN:

Q. Upon what do you base your knowledge?
A. Examination of our records.
Q. Who made the records?
A. Clerks in our office and employés of the company.
Q. Original records or transcripts?
A. Original records.
Q. What is your employment with the Terminal Association?
A. I am local agent at East St. Louis.
Q. Do you know whether or not those records are correct?
A. I am satisfied they are.
Q. Upon what do you base your satisfaction?
A. On one ground, that the records in these cases have never been disputed.
Q. By whom?
A. By anybody.
Q. What opportunity would there be for anybody to dispute them?
A. Every opportunity in the world, I should think, if there was any object.
Q. What would be the object of disputing them?
A. Don't know that I can answer that.
Q. Has there ever any occasion arisen to dispute?
A. What?
Q. The records.
A. At East St. Louis?
Q. In this particular case?
A. No, sir; not that I know of.
Q. Never have been tested?
A. Not in this particular case, so far as I know.
Q. Any records you made yourself?
A. No, sir.

Redirect by Mr. HANSON:

Q. Were they made in the regular course of business at your station?
A. Yes, sir.
Q. In the transaction of the business of the receiver at that place?
A. Yes, sir.
Q. Made up daily?
A. Hourly, you might say; made up when the waybills were received, or very soon afterward.

265 Q. So, when a waybill was received from the receiver it would be noted in your record, is that true?
A. Yes, sir.

Cross-examination by Mr. WARREN:

Q. Original record in which these waybills would be noted, or a transcript?
A. Books we made at the time.
Q. Only one record made of that information there?
A. Only one record in our office.

Mr. WILSON: I now wish to offer a little testimony.

Testimony of Aug. A. Poland.

AUG. A. POLAND sworn.

Direct by Mr. WILSON:

Q. What is your official relation to the receiver of the Chicago, Peoria & St. Louis railway?
A. Commercial agent at St. Louis.
Q. How long have you held that position?
A. Nearly two years.
Q. That covers the period of the fire at East St. Louis?
A. Yes, sir.
Q. I will ask you if you have had occasion recently to look into the matter of the shipment of quite a large number of cars containing barley, from the C., M. & St. P. railroad through the Rock Island and Peoria road, between October 22d and November 1st, 1894?
A. Yes, sir; I have.
Q. You may tell the master what was the situation in reference to the ability of the Chicago, Peoria and St. Louis Railway Company to handle at East St. Louis the shipments of barley at the time referred to, and what action, if any, you took in connection with the Terminal Railroad Association of St. Louis as to handling said barley?

(Objection.—Incompetent, immaterial and irrelevant. Entirely immaterial as to these claims what arrangements were made between the Terminal Association and the receiver in reference to handling that business. Whatever arrangements were made should not, in the nature of things, affect in any way any of these claims; arrangements made for their own convenience, I suppose.)

266 Q. My answer to that is, that the owners of this barley, the consignees at East St. Louis, parties representing and acting for the shippers knew of the particular situation, and having knowledge of the situation, consented to the shipment of the barley under the circumstances that then environed the Chicago, Peoria and St. Louis railway.

Mr. HANSON: I still object for the same reason.

The MASTER: It may lead up to something admissible. As one of the *res gestæ*, I will let it go in.

(Exception by counsel for intervenors.)

Q. State what the facts are.

A. On the 22d of October, 1894, the yards at East St. Louis were pretty well crowded with barley.

Mr. HANSON: You mean the Terminal Association yards?

A. Yes, sir; and in fact the tracks along the road were well stored with barley; and on the 22d of October we received a message addressed to Mr. Bushnell, general freight agent of the C., P. & St. L. This message was signed by the general freight agent of the Rock Island and Peoria, Mr. Stackhouse, stating they had 150 cars of barley they were holding for our line, and demanding we should make arrangement to take them at once or they would turn them over to one of our competitors. Mr. Bushnell was out of the city, and I took the matter up with the Terminal Association, asking if they could take the barley and store it and handle it. At first they stated they could not take it; crowded, and could not take care of it; but when I told them if they did not take care of it we had an arrangement with the Wiggins Ferry Company to take care of the barley, during the day they arranged to take care of fifty cars; agreed to take the cars and hold them. We immediately ordered the cars in.

Q. Did you afterwards take care of the rest of the hundred and fifty?

A. Yes, sir; ordered the fifty cars in on the 22d, on their agreement to take care of and store them.

Q. You may state whether or not this arrangement continued up to the date of the fire, October 28?

A. It did, yes, sir.

Mr. HANSON: Where were these fifty cars you ordered?

A. In the hands of the Rock Island & Peoria. I think at Peoria or on their line.

267 *Testimony of W. H. Calvert.*

Mr. CALVERT recalled.

Direct by Mr. WILSON:

Q. When, and under what circumstances did you report the cars lost or damaged by fire at East St. Louis to Mr. Bradley, the car accountant of the Chicago, Milwaukee & St. Paul railroad?

A. On request from Mr. Bradley by wire, dated October 30th, received at eight o'clock a. m., and the report was made on regular statement form.

Q. On what date?

A. On October 30th; and then November 1st, immediately gotten

up as soon as possible—mailed to Mr. Bradley November 1st, copy of the report.

Q. Did your report to Mr. Bradley made within two days after the fire cover all the cars lost or damaged?

A. I can't say; made a very thorough check of it, and I am under the impression, although not positive, there was one and possibly two cars omitted—not C. M. & St. P. cars—which I had not succeeded in getting information on at that time.

Q. Your report substantially made to include the barley cars?

A. Yes, sir.

Q. Know whether your report was received by Mr. Bradley?

A. I presume it was; never got report that it was not; I have it in my hand.

Q. Handed to you by me?

A. Yes, sir.

Q. You heard the questions asked Mr. Poland with reference to these hundred and fifty cars of barley between October 22d, and November 1st?

A. Yes, sir.

Q. Do you have any knowledge of the situation with regard to those cars?

A. I have no direct knowledge. I was advised by him or by wire over Mr. Bushnell's name that they would accept those cars on October 22d; at a later date, two or three days later, I also made arrangements with the Terminal Association to accept twenty-five cars to be held at their yards, in Madison, or at the yards of the St. Louis Bridge Company, which had then passed into the hands of the Terminal Association. That was made and the cars ordered in October twenty-seventh.

Q. Who do you mean arrangements were made with by which they agreed to take the cars?

A. The Terminal Railroad Association.

268 Cross-examination by Mr. HANSON:

Q. These cars had not yet arrived at East St. Louis when you made this arrangement?

A. No, sir; up at Madison.

Q. You don't know whether any of these you have in mind were any of the cars in controversy here?

A. I have not checked to see and I only state it to show that this barley was brought in with their knowledge and held there by their consent and under their solicitation.

(It was then informally agreed, as to further testimony to be introduced on behalf of the receiver from agents and shippers along the line of C., M. & St. P. railway, that a couple of important stations should first be visited, by a representative of the receiver, and testimony taken if desired, conclusion of the hearing meanwhile suspended for the purpose; and that in two weeks parties should reap-

pear before the master to close the hearing unless by agreement an earlier date should be set.)

The following are the written insertions made in C., M. & St. P. waybills of which the foregoing is a true blank form as the same were introduced in evidence and made exhibits:

EXHIBIT TO TESTIMONY.

Blank Forms of Waybills.

Exhibits in connection with testimony offered by intervenors, hereto attached.

Chicago, Milwaukee & St. Paul Railway.
From La Crosse to East St. Louis.
W. W. C. Co. L. Lemke & Co.
St. Louis, Mo. Barley 40,650 # $28.46 Paid.
Via Rock Island & K. S. E. line.
Free a/c transit.
Rate applied to St. Louis.

Chicago, Milwaukee & St. Paul R'y.
From Savannah to East St. Louis, Ills.
To Teichman Com. Co. St. Louis.
Barley 32,250 # $22.58 Paid.
Rate applies to St. Louis.

Chicago, Milwaukee & St. Paul R'y.
Car # 31098 St. P. Savannah to East St. Louis, Oct. 19, 1894.
Teichman Com. Co.
St. Louis, Mo. Barley 30,000 # $21.00 Paid.
Rate applies to St. Louis.

269 Chicago, Milwaukee & St. Paul R'y.
Car # 33134 St. P. Savannah to East St. Louis, Oct. 21, '94.
Teichman Commission Co.
St. Louis, Mo. Barley 36,300 # $25.43 Paid.
Rate applies to St. Louis.

Chicago, Milwaukee & St. Paul R'y.
Car # 2420 St. P. Savannah to East St. Louis, Oct. 21, 1894.
Teichman Com. Co.
St. Louis, Mo. Barley 30,100 # $21.07 Paid.
Rate applies to St. Louis.

Chicago, Milwaukee & St. Paul R'y.
Car # 31204 St. P. Savannah to East St. Louis, Oct. 23, '94.
Teichman Com. Co.
St. Louis, Mo. Barley 44,380 # $31.07m.
Rate applies to St. Louis, Mo.

Chicago, Milwaukee & St. Paul R'y.
Car # 46992 St. P. Savannah to East St. Louis, Oct. 23, 1894.
Teichman Com. Co.
St. Louis, Mo. Barley 50,470 # $35.33.
Rate applies to St. Louis, Mo.

Chicago, Milwaukee & St. Paul R'y.
Car # 15944 St. P. Savannah to East St. Louis, Oct. 23, 1894.
Teichman Com. Co.
St. Louis, Mo. Barley 44,450 # $31.12.
Rate applies to St. Louis.

Chicago, Milwaukee & St. Paul R'y.
Car # 6364 St. P. Savannah to East St. Louis, Oct. 23, 1894.
Teichman Com. Co.
St. Louis, Mo. Barley 30,000 # $21.00.
Rate applies to St. Louis.

Chicago, Milwaukee & St. Paul R'y.
Car # 12886 St. P. Savannah to East St. Louis, Oct. 23, 1894.
Teichman Com. Co.
St. Louis, Mo. Barley 30,050 # $21.04.
Rate applies to St. Louis.

270 Car St. P., # 38108 Oct. 10, 1894.
Via Rock Island.
Freight forwarded from Ossian, Iowa, to East St. Louis.
Teichman Com. Co.
St. Louis, Mo. Bulk barley 40,000 # $60.00.

Car UL # 10071 Oct. 27, 1894.
Via Rock Island.
Freight forwarded from Lake City to St. Louis.
L. Lemke & Co.
St. Louis.
W. W. C. 30,150 # $51.26.

Car St. P. # 24908 Oct. 17, 1894.
Via Rock Island.
Freight forwarded from Lake City to St. Louis.
W. & C. to L. Lemke & Co. Barley 40,000 # $68.00.

Car # 10536,
Via Rock Island to Sept. 6, 1894.
Freight forwarded from Lake City to St. Louis.
P. B. M. to L. Lemke & Co. Barley. 30,500 $51.58.

Car St. P. # 3218, Oct. 6, 1894.
Via Rock Island, J. S. E.
Freight forwarded from Lake City to St. Louis.
P. B. M. to L. Lemke & Co. Barley. 30,000 # $51.00.
Car M. & N., # 1232.

La Crosse to East St. Louis, Oct. 16, 1894.
W. W. C. Co. L. Lemke & Co.,
St. Louis, Mo. Barley. 50,400 # $35.28.
Via Rock Island.
Rate applies to St. Louis, Mo.

CONDITIONS AND RULES

FORMING PART OF THE WITHIN CONTRACT.

1. The Corporation will not receive or carry any Bank Bills, Drafts, Notes, Deeds Contracts, evidences of property or other writings, or be responsible for their loss or injury.

2. No Conductor, or other agent of the Corporation, is authorized to take charge of Bank Notes, Money or other valuable papers or things, for, or on account of the Company, or to receive any perquisites or reward, for himself or for the Company, on or for such articles.

3. No Gold or Silver Coin or Bullion, or manufactured articles of gold and silver, or Jewels' Watches, Pictures, Plated Articles, Statuary, Musical Instruments, Glass, Silks, Laces, will be carried by the Corporation, for the loss of which it will be responsible, unless with such articles when delivered, as also delivered a memorandum in writing, stating the character and kind of articles and their value, and unless the proper extra price for the carriage and responsibility for such articles be paid.

Carriages and Heights, Show Cases, Machinery, Stoves and Castings, Marble, Looking Glasses, Mineral Acids, Boreal Potatoes, all Liquids put up in glass or earthenware, Cabinet Ware and Furniture will only be taken at the owner's risk of fracture or injury during the course of transportation, and the loading and unloading thereof, unless specially agreed to the contrary.

4. Gunpowder and combustible articles of any description will be taken only on special terms and rates. If found secreted among other goods they will be taken from the cars and stored. In case of damage in consequence of the same being so secreted, the shipper or consignor will be held liable.

5. Articles will not be received for transportation unless properly packed in suitable CASES BOXES, BALES or PACKAGES, and each must be well and clearly MARKED with the name of the CONSIGNEE and of the STATION where they are to be delivered; otherwise they will not be receipted for, in which case no damage for loss or misdelivery will be paid. The Company will in no case be responsible for loss, injury or damage which might have been avoided by skillful and more careful and sufficient packing, or which occurs without the negligence or fault of the Company or its agents. All property is subject to cooperage when necessary.

Goods in bundles will not be considered as properly packed, and the Company will not be responsible for any loss of parts or of the whole of such packages.

No allowance for deficiency of Lemons, Oranges or other fruit, if not covered with canvas will be made.

6. The Corporation will not be responsible for damage occasioned by delays from storms, accidents or unavoidable causes; or by decay or injury to fruit, fish, dressed hogs, dressed poultry or other perishable property, or from injury to property produced by frost, Lead, or the elements, and the Corporation will not be liable for the non-delivery of such property in any certain time, nor in time for any particular market.

7. The charges on lettered marble must always be prepaid.

The charges on perishable property must always be prepaid.

7. The Corporation will not undertake or agree to carry property by any particular train, nor in time for any particular market, nor are they to be responsible for loss or damage arising from any delay or stoppage, however occasioned, but they will forward the same with as reasonable dispatch as the general business of the Corporation will permit.

8. The Corporation will only be liable as warehouse-men, after the property has been placed in their freight depot. But no loss or damage to property by fire, while in their freight depot or storehouse, the Company will not be liable.

9. Storage, at customary rates, will be charged for all property not taken from the warehouse within one day after arrival.

10. The Corporation will not be responsible for loss or injury happening to or occasioned by unruly or vicious horses, cattle, swine or sheep, nor for accidents to the same in loading, carrying or unloading the same, nor for any damages however caused, to stock or animals of any description, transported or carried upon their railway, or in their cars or vehicles.

11. The Corporation will not be responsible for loss or damage to any article by fire or otherwise, the bulk of which renders it necessary to be forwarded in open cars.

12. Goods or property consigned to any place of the Company's line of road, or to any point or place beyond its termini, will be sent forward with as reasonable dispatch as the general business of the Corporation, at its warehouse within mentioned, will admit, by a carrier or freight-man, when there are such known to the station agent at said warehouse, willing to receive the same unconditionally, for transportation, the Company acting for the purpose of delivery to such carrier or freight-man, as the agents of the consignor or consignee, and not as carriers. The Company will not be liable or responsible for any loss, damage or injury to property after the same shall have arrived at the within-mentioned Company's station for delivery to the owner, consignee or to the connecting carriers or freight-men for transportation.

13. No station agent or clerk has authority to alter or vary any of these Rules and Conditions.

All carload freight shall be subject to a minimum charge for trackage and rental of $2.50 per car for each 24 hours detention or fractional part thereof after the expiration of 48 hours from its arrival at destination, and after the expiration of 72 hours, this Company shall be at liberty to unload and store the freight in a warehouse of its own or unload and deliver to a warehouseman, and the Consignee or Consignee shall pay the C., St. P., M. & O. Company the expense of unloading and warehousing same, and for such expense this Company shall have a lien upon the freight in addition to its own freight charges and back charges.

Chicago, Milwaukee & St. Paul Railway Co.

No. _____

Shipped by _____

Consigned to _____

Agents _____

_____ 189_

_____ Agent.

No. _____ Station _____ 189

RECEIVED from _____

in apparent good condition

MARKS AND CONSIGNEE.	DESCRIPTION OF PROPERTY.	WEIGHT.

Way-bill Exhibits.

249 - 250

271

187A

272 The following are the written insertions made in the station receipts, of which the foregoing is a true blank form, as the same were introduced in evidence and made exhibits:

Waybill Exhibits.

SAVANNAH, *Oct.* 23, 1894.

Received from B. R. Gr. Co.
To Teichman Com. Co.
St. Louis, Mo. Barley.

31204	44,380
46992	50,470
15544	44,400
6364	30,000
12886	30,050

W. G., *Agent.*

SAVANNAH, *Oct.* 21, 1894.

Received from B. R. Gr. Co.
Teichman Com. Co.
St. Louis, Mo. Barley.

St. P., 33134	36,320
2430	30,100

W. G., *Agent.*

SAVANNAH, *Oct.*, 1894.

Received from B. R. Gr. Co.
Teichman Com. Co.
St. Louis, Mo. Barley.
St. P., # 31,098 30,000 #
W. G., *Agent.*

SAVANNAH, *Sept.*, 1894.

Received from B. R. Gr. Co.
Teichman Com. Co.,
St. Louis, Mo. Barley.
St. P., # 3524 32,250 #
W. G., *Agent.*

LA CROSSE, *Oct.* 12, 1894.

Received from W. W. C. Co.
Teichman Com. Co.
St. Louis, Mo. Car 20022 41,100
Barley.
J. C. H., *Agent.*

273 LA CROSSE, *Oct.* 12, 1895.

Received from W. W. C. Co.
Teichman Com. Co.,
St. Louis, Mo. Barley. Car # 32986 40,400
J. C. H., *Agent.*

LA CROSSE, *Oct.* 23, 1895.

Received from W. W. & Co.
St. Louis, Mo. Barley.
Car #1100. 30,005#
J. C. H., *Agent.*

OSSIAN, *Oct.* 10, 1895.

One car, U. L., 10071.
Received from Gilchrist & Co.
Teichman Com. Co.
St. Louis, Mo. Bulk barley. 40,000#
W. F. C., *Agent.*

LAKE CITY, *Oct.* —, 1895.

Received from Wilson & Cargill.
One car, St. P., 3218.
L. Lemke & Co.
St. Louis. Bulk barley. 30,000#
F. H. B., *Agent.*

LAKE CITY.

Received from P., B. & M.
L. Lemke & Co.
St. Louis. Bulk barley. 30,000#
F. H. B., *Agent.*

LAKE CITY.

Received from P. B. & M. St. P. car #10536.
L. Lemke & Co.
St. Louis. Barley. 30,000.
F. H. B., *Agent.*

LAKE CITY.

St. P. car. #34908.
Received from Wilson & Cargill.
L. Lemke & Co. Barley. 40,000#
F. H. B., *Agent.*

1877

253-254

274

Certificate of Evidence.

Way-bill Exhibit.

Form 181.

CHICAGO, MILWAUKEE & ST. PAUL RAILWAY CO.

ALL RAIL

THROUGH FAST FREIGHT LINE.

BONDED.

J. H. HILAND, General Freight Agent, Chicago.

La Crosse, Oct 16 1894

No. 2178

Received from W. W. Cargill Co.

in apparent good order by the CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, the following described packages marked and numbered as per margin, subject to the conditions and regulations of the published tariffs of said Company, to be transported over the line of this Railroad to Red Island

and delivered after payment of freight or like vend order to Sept. 26 a company or carrier (of the same are to be forwarded beyond the lines of the Company's road) to be carried to the place of destination; it being expressly agreed that the responsibility of this Company shall cease at this Company's depot, at which the same are to be delivered to such carrier; but this Company guarantees that the rate of freight for the transportation of said packages shall not exceed rates noted in margin of this bill of Lading and charges advanced by this Company. **Provided contents of packages are correctly stated in Railroad Receipts (original and duplicate,) on which this Bill of Lading is based,** subject to the following conditions:

"This Company shall not be responsible for the loss of packages the contents of which are unknown; for the leakage of any kind of Liquids, breakage of any kind of Glass, Carboys of Acid or Articles packed in Glass, Stoves or Stove Furniture, Castings, Machinery, Carriages, Furniture, Musical Instruments of any kind, Packages of Paper or for loss or damage on Hay, Hemp, Cotton of any article where such receipt is necessary to transport on open cars, or for damage to perishable property of any kind, occasioned by delays from any cause, or change of weather, nor for any loss of weight of Grain, or Coffee in bags, or Rice in barrels, nor for loss or damage on the lakes and rivers unless it can be shown that such damage or loss occurred through the negligence or default of the Agents of the Company. It is further especially agreed that for all loss and damage occurring in the transit of said packages, the legal remedy shall be against the particular carrier or forwarder only in whose custody the said packages may actually be at the time of the happening thereof, it being understood that the said **CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY,** assumes no other responsibility for their safe carriage or safety than may be incurred on its own road. All packages subject to charge for Demurrage if necessary.

All inclosed freight shall be subject to a minimum charge for truckage and rental of $1.00 per car for each 24 hours detention or fractional part thereof after the expiration of 48 hours from the arrival at destination, and after the expiration of 72 hours, this Company shall be at liberty to unload and store the freight in a warehouse of its own or thereof and deliver to a commission and the Consignee or Consignor shall pay the C., M. & St. P. Ry Company the expense of unloading and warehousing same, and for such expense the Company shall have a lien upon the freight in addition to its own freight charges and back charges.

MARKS AND CONSIGNEE.	No. PKGS.	DESCRIPTION OF PROPERTY AS GIVEN BY CONSIGNOR.	WEIGHT. Subject to Correction
L Benoit & Co Ste. Louis, Mo		Buck Barley Std. 1 C M. St P 17272	40650
		Buck Barley Std. 1 M & N 1232	50400

Via Red Island and

A. S. Line

Each article comprising this shipment is hereby declared to be subject to, and governed by, that classification and Rules as published by Railroads, and to the rates properly belonging to such Classification, and the rate as per the above or below shall only apply to such goods as are included in the class opposite or against which the rate is so written in

ORIGINAL.

RATES

From

To

If 1st Class ..... cts. per 100 lbs

If 2d Class ..... cts. per 100 lbs

If 3d Class ..... cts. per 100 lbs

If 4th Class ..... cts. per 100 lbs

If 5th Class ..... cts. per 100 lbs

If 6th Class ..... cts. per 100 lbs

If Class .... cts. per 100 lbs

Charges Advanced, $

J Hustbahn

B

Agent.

275 *Testimony of E. J. Tull.*

Circuit Court of the United States for the Southern District of Illinois.

MERCANTILE TRUST COMPANY OF NEW YORK, Complainant, *vs.* CHICAGO, PEORIA AND ST. LOUIS RAILWAY Company, Defendant. } Consolidated Cause.

In the matter of the intervening petitioners, The Chicago, Milwaukee and St. Paul Railway Company, Carr, Ryder & Engler Company, S. Y. Hyde Elevator Company, and others.

On this 10th day of October, 1895, the receiver of the Chicago, Peoria and St. Louis Railway Company appeared by Mr. P. B. Warren, its attorney, and the petitioners by Mr. Burton Hanson, their attorney, for the purpose of taking the depositions of Mr. S. Y. Hyde, of the S. Y. Hyde Elevator Company, Mr. E. J. Tull, secretary of the W. W. Cargill Company, and Mr. J. C. Hietbahn, agent at La Crosse of the Chicago, Milwaukee and St. Paul Railway Company, before Helmus W. Thompson, notary public in and for La Crosse county, Wisconsin; and it is now stipulated that the depositions of these parties may be taken with the same effect and force as if taken upon notice duly and regularly given, and that the depositions when so taken may be filed herein and used in evidence the same as if taken before the master in chancery, Mr. Stuart Brown, of Springfield.

It is further stipulated that these depositions when taken and signed may be sent to Mr. J. T. Jones, the clerk of said court at Springfield, Illinois, without any formal certificate attached thereto by the notary public before whom the depositions are taken.

Mr. E. J. TULL, being first duly sworn, testified as follows:

By Mr. WARREN: Please state your name.

A. E. J. Tull.

Q. Are you connected with the W. W. Cargill Company, and if so in what capacity?

A. Secretary and treasurer.

Q. How long have you been secretary and treasurer of the W. W. Cargill Company?

A. Ever since its organization.

276 Q. Were you secretary and treasurer then during the months of October and November, 1894?

A. Yes, sir.

Q. Are you secretary of the W. W. Cargill Company which is petitioner in this cause?

A. Yes, sir.

Q. Will you kindly state the steps which your company takes, or

which it did take in the particular instance of shipping barley to the Teichman Commission Company in cars numbered 32986–20222, 1100 and 15254?

A. Well, I suppose with those cars the same steps were taken that we usually take. I do not now just remember the steps taken, but our method was in the afternoon of the days the cars were loaded to send a boy to the elevator to bring down from the elevator the notices of the shipments that had been made that day; and it was the elevator man's business to send us a slip to the depot giving the car number, destination, and name of party to whom the grain was to be shipped. He left that with the agent of the St. Paul Company, which were their instructions and directions as to shipment.

Q. You speak of sending the boy to the elevator; is that your elevator?

A. Yes, our elevator where our grain is shipped.

Q. At what time do the bills of lading come into your possession?

A. Well, we were not in the habit of getting bills of lading for the cars unless we wanted to draw against the grain shipped. I don't know as we ever drew against the Teichman Company, but it was sometimes necessary where we did not know the parties shipped to, and did not know whether they would honor the draft to take a bill of lading to show that the grain had been shipped. I don't think there were any bills of lading delivered to us on the cars shipped to Teichman & Company. We did not usually require them at the time of shipment.

Q. Did you get any receipts from the railroad company?

A. No, we did not.

Q. Did you have anything or receive anything to show that you had delivered to them cars for shipment?

A. I don't think we had.

Q. How did your consignee know that cars would be coming to him?

A. We notified him every evening when the boy came down from the elevator; he got down about five o'clock. He leaves notification with the railroad agent where to ship this stuff. He comes to the office and makes out a notification to the party to
277 whom the stuff is to be shipped, giving the car number, date of shipment, etc.

Q. And that is sent to the consignee?

A. Yes, sir.

Q. What is sent to the consignee?

A. The car number, the date of shipment, the amount of grain shipped, etc.

Q. Simply in the form of a letter?

A. We have a kind of form for that.

Q. A form?

A. Yes, sir.

Q. Will you attach one of those notices or forms which you use to your deposition and make it a part of it?

A. Yes, sir.

(Notice attached and made a part of the deposition, marked Exhibit "B.")

Q. Did you ever in any of your shipments receive station receipts from the railroad company?

A. Yes, sir.

Q. Are those receipts filled out entirely in the railroad office?

A. Yes, sir.

Q. I will ask you if you ever did receive any of those station receipts for these cars and contents now in controversy?

A. It seems to me we did; we got them some time, I believe, since the suit was commenced and sent them to the party at Springfield, I believe to be used.

Q. Those were received by you after the loss occurred?

A. Yes, sir.

Q. Did you make any objection to them in any way?

A. The receipts?

Q. Yes.

A. Not that I know of.

Q. Were there at any time any bills of lading issued for these cars?

A. Not to us; I believe the bills of lading are the documents by which the cars are moved; the railroad company hold those.

Q. Who did you make your contract of carriage with? And who did you in the special instance of these cars?

A. I do not just understand. Of course we shipped all our stuff by the St. Paul road; we are on that road.

Q. Don't you ship by contract of some sort?

A. Written?

Q. Any kind?

A. Mutual *nu*derstanding, I guess.

Q. Who do you make your rates with and how are those rates ascertained?

278 A. The rates of the company are all printed on circulars, and they are sent to us as shippers.

Q. And you make your shipments then on those circulars?

A. Yes, sir.

Q. Have you one of those circulars?

A. We have got hundreds of them; they are regular freight tariffs; they are not personal contracts. They are general notifications of what the freight is to different points. If we do not understand the rate to a certain point we call up the agent and ask him, and he gives us the rate. That is all there is of a contract.

Q. How long have you been shipping over the Chicago, Milwaukee & St. Paul road?

A. Ever since the company was organized; of course, this company before was W. W. Cargill & Brother. They have been shipping probably twenty years.

Q. And during that time you have taken these station receipts as set forth in the evidence introduced for the intervenors before the master on September 3 and 4, 1895. (Copy shown witness.)

A. Always.
Q. Did you ever make any objection to them?
A. No, sir.

By Mr. HANSON:

Q. Mr. Tull, have you ever read this station receipt?
A. Why, I don't know.
Q. Do you now, or have you ever known, what its contents are as to limitation of liability of the railroad company in case of loss or damage?
A. No, sir.
Q. Is there any limitation of liability of the railroad company in these station receipts, or commercial bills of lading, you are not aware of it?
A. No, sir; anything that is supposed to affect the liability of the railroad company to my knowledge has always been given specifically, like on flax. At certain rates, we ship at owner's risk, and that matter is brought up and personally called to our attention.
Q. Has anything ever been called to your attention specifically in respect to limitation of liability of the railroad company in the shipment of barley?
A. No, sir.
Q. Was the only understanding that you ever had of this station receipt, or commercial bill of lading, on any shipment you have made, that in any delivery of barley to the railroad company,
279 you understand that the railroad company was to safely carry it and safely deliver it to its destination?
A. Yes, sir.
Q. And you never had any other understanding or arrangement?
A. None.
Q. Now you say you have a great many times taken these station receipts or commercial bills of lading; do you get them personally or Mr. Cargill, or are they simply received and filed away in the office, or are they sent to the consignee?
A. Neither Mr. Cargill nor I get them personally; the boy brings them up if they are to be used to draw against, and they are either attached to the draft or forwarded by mail.
Q. In these shipments in question to Teichman & Company at St. Louis, no station receipts or commercial bills of lading were issued at the time of shipment.
A. I do not think there were.
Q. I understand that it was after the fire occurred that you obtained them from the railroad company for the purpose of perfecting your claim against the railroad company?
A. That is the time we got them.
Q. You received them and sent them right to Springfield, do you understand?
A. I think that is the place.
Q. Are you certain whether you sent them to Springfield to the

claim agent there, or the claim agent of the Milwaukee road at Chicago?

A. I am not sure, but I think it was at Springfield.

Q. Were these station receipts or commercial bills of lading required by the claim agent of the railroad company for the purpose of showing that you had delivered the grain to the company, and the quantity, etc., to perfect the claim?

A. It was to perfect the claim, but the object or part of the claim I don't remember. Whenever we made a claim, which we did every time we had property destroyed—and we have often had property burned or destroyed before it got to St. Louis—we got those receipts.

Q. Because they were called for?

A. Yes, sir.

Q. By whom?

A. I don't know; but I think likely the railroad companies. We have never had to prosecute a claim by law.

Q. I understand that when you had some barley to ship, for instance to St. Louis, as this barley in question was shipped, when it was loaded in the car your clerk would make out what was called a shipping bill?

280 A. Yes, that is it.

(Shipping bill marked Exhibit "A" shown to witness.)

Q. That would be filled out by your clerk?

A. Yes, sir.

Q. And delivered to the agent of the railroad company?

A. Yes, sir.

Q. And that in most instances you would take no station receipt or bill of lading for your shipment?

A. Yes, sir.

Q. And only in instances where you drew against the shipment you would take a station receipt, or bill of lading?

A. Yes, sir.

Q. And in the shipment in question in this controversy you received no receipt of any kind until after the fire?

A. Yes, sir.

Q. And when they were made out they were made out by the agent of the railroad company?

A. Yes, sir.

Q. You have no knowledge now of ever having seen the station receipts or commercial bills of lading that were in fact made out after the fire for these cars?

A. No, I am not sure.

Q. And you say you have never read them or examined them to see what the contents was as to the limitation of liability of the railroad company in case of loss or damage?

A. I presume I have read over the backs but I am not sure, but I have no idea what the back contains. I never read them with the idea of ascertaining the liability of the railroad company or anything of the kind. Our object was to show the party that we

had shipped the grain; the receipt shows to the party that we draw against that the grain had been shipped.

Q. And you took them for that purpose?

A. Yes, sir.

Q. You were asked about a contract for shipment, and you spoke in reference to rates. Was that the only subject that you contracted on, as to what the rate would be? So far as you had an understanding between yourselves and the railroad company in regard to shipments, was it in regard to what the rate would be?

A. That is all; we never have any contract.

Q. I will ask you, Mr. Tull, were you aware at the time of the shipments in question, or at the time the station receipts or commercial bills of lading were delivered to you after the fire in question, that there was any restriction or limitation contained in those receipts or bills of lading of the liability of the railroad companies in case the barley should be lost or damaged?

A. No, sir.

281 Examination by Mr. WARREN:

Q. You say you have read these receipts?

A. No; I did not say I had. I said I could not swear I had not. I cannot swear whether I have or not. I don't remember. I know I have seen thousands of them and I may have read them, but I don't remember; I could not swear that I ever did.

Q. You also said that the receipts were made out in the office of the railroad company, and you did not know whether they were forwarded by the railroad agent to Springfield or to Chicago, or whether they were forwarded by you?

A. No; I did not say that.

Q. What did you say?

A. Whether I saw them personally or whether the company sent them.

Q. Your company sent them?

A. Some of the clerks.

Q. And you think they were sent either to Springfield or Chicago?

A. I don't know the place; I know we had to get receipts.

Q. As a matter of fact didn't you send them to Teichman & Company at St. Louis?

A. I don't remember.

Q. These particular shipments were made by you with the understanding, and just as all your previous shipments were made, were they not?

A. I presume so.

Q. I mean previous shipments of barley. Don't you know whether or not it was; or would anybody else in your company know?

A. I don't believe anybody would know whether they were made as all our previous shipments were made. Some shipments may have been made differently, but I know of no reason why these should have been different from other shipments.

Q. And as far as you know, they were not?

A. No, sir.

Q. Please state under what arrangements with the consignees this barley was shipped; what was your course of business with them.

A. We shipped the barley, notified the consignee of the shipment as to grain, weight, etc., car number, and in course of time the consignee rendered us an invoice of this grain and remitted the proceeds.

Q. I mean these particular shipments?

A. These barley shipments are sent out and the consignees
282 of course give us an invoice of it, and when a sufficient time has elapsed for returns, and we do not get them we write to the consignee to hurry him up, and if anything has happened to the grain and it does not reach its destination, tracers are sent out after the cars. In this case of course no grain ever reached Teichman and Company and we never had any proceeds.

Q. Did you sell this grain to Teichman & Company, or were they acting for you as your agents to sell it for you on 'change?

A. We actually sold it to them the same as to any commission-house; he probably sold the grain afterwards, but he was responsible to us.

Q. You sold it to him at a certain price?

A. Per bushel; yes.

Q. Were you aware that it was the custom of Teichman & Company to hold that grain on tracks at East St. Louis subject to the market?

A. No.

Q. What was your understanding about that, that the grain was sold immediately as it arrived there?

A. That the grain was sold by Teichman & Company before we shipped it; the way they do business they wire us that their bid is so much. We wire back that we cannot accept their bid, but must have a cent a bushel more, and probably we get a message from them, "Unable to sell your barley at price offered." That may end it for that day, and probably the next day they will wire, "Bid you so much," when they can sell it for the price offered. Our understanding is that this barley is always all sold before it is shipped.

Examination by Mr. HANSON:

Q. But you consider it your barley until there is a delivery of it and it is accepted?

A. Yes, sir.

Q. Say you make a sale to be delivered at St. Louis, and until the barley is delivered there, there is no sale?

A. No, sir.

Q. You are the Cargill & Company, who are the present owners of this claim?

A. Yes, sir.

Q. This barley in question was shipped under the railroad company's established rates from the point of shipment to St. Louis?

A. Yes, sir.

283 Q. And there was no diminution of the rate or less charge given you for this shipment than the rate to all shippers?

A. No, sir.

E. J. TULL.

Testimony of S. Y. Hyde.

Mr. S. Y. HYDE, being first duly sworn, testified as follows:

Examination by Mr. WARREN:

Q. You may state your name.

A. S. Y. Hyde.

Q. And what relation you sustain to The S. Y. Hyde Elevator Company, petitioner in this cause?

A. The president and manager.

Q. Please state what steps were taken by you or your company to deliver the barley in question to the Chicago, Milwaukee & St. Paul Railway Company?

A. We shipped it from the station in the country, get a receipt for it, and it is brought here to the elevator at La Crosse, and when it is properly prepared, consign it to St. Louis or wherever it is to go. Our elevator foreman loads the cars for St. Louis, and a list of the cars that he has loaded during the day is sent to the agent of the C., M. & St. P. R'y, and he is instructed to forward those cars to the consignee at St. Louis. Then we notify the consignee of the car numbers, the weight and sample (using form attached and made part of this deposition, marked Exhibit "C"), of the barley, whether it is A or B, or whatever it is. I will state for your information that this barley is all sold by sample to St. Louis; we never consign any there. It is all sold by sample.

Q. How do you mean?

A. We make up a sample of barley and send it by express to St. Louis, and the barley is sold on that sample. When it is delivered, it must be delivered as up to that sample.

Q. Do you ever, or do any of your agents and employés fill out the blanks in these station receipts which you speak of?

A. Do you mean in our office here? Not that I am aware of; it has never been done here to my knowledge; but these receipts do not go to St. Louis, they simply come here to La Crosse.

Q. You have branch houses out along the line, I understand?

A. Yes, sir.

Q. And you have barley stored there?

A. We buy it there.

Q. You do not have any elevators there?

284 A. O, yes.

Q. When you make a sale, do you order that barley down to La Crosse and then reship it?

A. Not the identical barley; the barley is coming all the time to La Crosse, but they do not know where it is going to. Our agents on the line don't know where the barley is to go.

Q. They send it to you and you reship it from here?
A. Yes, sir.
Q. In reshipping it from here do you get any bills of lading or station receipts?
A. No, sir; not naturally; that is not the custom. We might if we were sending to parties east of Chicago where they do not know us and they require a bill of lading; but in this case never took bills of ladidg; we were shipping on open account.
Q. Have you ever shipped any barley and received bills of lading or station receipts?
A. From the elevator here?
Q. Yes.
A. No, sir; not to my knowledge, not to St. Louis. We may have shipped some to Cincinnati. I don't remember that we ever called for a bill of lading.
Q. Would you know if you had?
A. I could not tell without looking the books up to see if a bill of lading accompanied the draft, which could only be proven then by a letter.
Q. You may state if you ever did receive a bill of lading or station receipt, if you ever made any objection to it, or protest.
A. I never have made any objection to receipts.
Q. I hand you this paper and ask you to state what it is. (Indicating.)
A. It is a claim for the barley that was burned; five cars of barley.
Q. This barley in question?
A. Yes, sir.
Q. I wish you would state whose claim it is.
A. It is the claim of the S. Y. Hyde Elevator Company.
Q. Who made it?
A. It was made out by the secretary of our company.
Q. Do you know his handwriting?
A. Yes, sir.
Q. Is that his handwriting?
A. Yes, sir.

Mr. WARREN: I offer that in evidence for the purpose of establishing the fact that the handwriting in that claim for barley is the same as the handwriting in the body of the station receipt offered in evidence by petitioner.

285 Q. Mr. Hyde, I will call your attention to the station receipt dated October 16, 1894, from the S. Y. Hyde Elevator Company, as offered in evidence for petitioner before the master, and ask you to state if you are familiar with that handwriting?
A. Yes, sir; I am.
Q. Whose handwriting is that?
A. The handwriting of Mr. Clark, who was secretary of our company at the time; he is not working for us now.

Examination by Mr. HANSON:

Q. Do you know when this station receipt, which you say is in the handwriting of Mr. Clark, was made out?

A. I have no knowledge of it except the date of it there.

Q. Do you know whether it was made out after the fire or before?

A. I cannot tell you, but my impression is it was after the fire.

Q. Made out for the purpose of presenting the claim?

A. Yes, sir.

Q. And was asked for either by the consignee or the claim agent of the railroad company?

A. It was required by somebody to establish our claim.

Q. Mr. Hyde, you were asked if you ever protested or made any objection to any of these receipts which were received by you for shipments. I will ask you if at that time or at any time before that time you had read the contents of these receipts?

A. No, sir.

Q. Did you know at that time, or have you known at any time what they contained?

A. No, sir.

Q. Were you at any time aware that there were any limitations or restrictions as to the liability of the railroad companies for liability in case of loss or damage of the property contained in them?

A. I never was.

Q. In these shipments which you made of this barley in question, did you pay the regular established tariff rates on the barley?

A. Yes, sir.

Q. No concession of rates in any way; you paid the rate which all paid?

A. Yes, sir.

Q. And it was the rate charged through to St. Louis?

A. Yes, sir.

Q. Is this the first time you have ever seen this station receipt which you say was made out by Mr. Clark?

286 A. Yes, sir; this is the first time.

Q. Did you know up to the present time that it had been made out?

A. I did not know of it.

Q. And you only now know by looking at it?

A. He was the proper person to make out the claim, or was when he was in our employ; he is not in our employ now.

Q. And it was made out for that purpose?

A. Yes, sir.

Q. You do not keep the station receipts in your office, and never have, do you?

A. Not that kind; we keep our own station receipts in our office.

Q. But these you do not keep, nor do not make out?

A. No, sir.

Q. And if this was made out in your office, it was made out for the purpose of making up the claim?

A. That is it; yes.

Q. Because it was required by the consignee or the railroad company as proof of the delivery of the property to the shipper?

A. Yes, sir.

Q. Have you ever had any understanding with the railway company in any way, by which its liability should be limited in case of loss or damage to your property?

A. No, sir.

Q. No talk about it in any way?

A. No, sir.

Q. What has been your understanding when you have delivered barley to the railway company, consigned to St. Louis and other points, as to your rights in case the property was lost or damaged, or failed to reach its destination?

A. We have always considered the railway company responsible to us for the delivery of goods we shipped.

Q. Had you knowledge of any limitation or restriction of liability, or any different agreement by which they would not be responsible?

A. No, sir; we have never even dictated the route by which they should ship our grain to St. Louis.

Q. You simply delivered the property to the St. Paul Company with the understanding that it should be delivered at St. Louis?

A. Yes, sir; and they were to deliver it at St. Louis over any route they saw fit.

Q. That is about the only understanding you ever had about it?

287 A. That is the only understanding.

Q. I suppose you made out these shipping bills which have been introduced in evidence?

A. Some one in our employ makes them out.

Q. And you also, on the day the barley is shipped, mail a notice to your consignee, the form of which will be put in evidence, the same as Cargill & Company?

A. I did not see their form, but I presume they are precisely alike.

Q. The S. Y. Hyde Elevator Company owned this barley in question at the time it was burned?

A. Yes, sir.

Q. And while there was a sale of it to the consignee, as you say, yet the sale was not complete until the barley had reached St. Louis, and had been accepted?

A. That is it.

Q. And there having been no acceptance the property was still yours?

A. Yes, sir; and we shipped other barley to St. Louis in place of this which was burned.

Examination by Mr. WARREN:

Q. Testifying as to your understanding, and as to your not having knowledge of the restrictions and conditions contained in this

receipt, you do not mean to testify that Mr. Clark, or some other member or agent of your company did not know them?

A. I could not testify as to their knowledge of anything. I do not think they knew anything about it; they carry out the orders of the manager.

Q. If you have any printed tariffs or information as to the manner of shipping, and the rates, etc., will you kindly make it an exhibit to your evidence?

A. Would it make any difference if you said printed or written? Yes, we have had them and I presume I can find them now.

Q. If you can find one will you kindly make it part of your evidence?

A. Yes, sir.

Mr. HYDE: In compliance with Mr. Warren's request that I should furnish a tariff, I herewith hand the notary a tariff of the Chicago, Milwaukee & St. Paul Railway Company, in effect June 26th, 1893, and which was in force during the month of October, 1894.

This tariff the notary has marked Exhibit "D."

S. Y. HYDE.

288 *Testimony of J. C. Heitbahn.*

Mr. J. C. HEITBAHN, being first duly sworn testified as follows:

Examination by Mr. HANSON:

Q. Mr. Heitbahn, you are the agent of the Chicago, Milwaukee & St. Paul Railway Company at La Crosse?

A. I am.

Q. How long have you been agent here?

A. A little over a year and a half.

Q. You were agent here during the month of October, 1894?

A. Yes, sir.

Q. I will call your attention to a station receipt signed by you, dated October 16th, 1894, receipting for five cars of barley from S. Y. Hyde Elevator Company, which is marked "duplicate" in the files, and will ask you if that was made at the time of the shipment or after the property was destroyed?

A. That was made out afterwards.

Q. After the property was destroyed?

A. Yes, sir.

Q. Do you know whether one had been issued at the time the property was shipped?

A. No, sir; I do not.

Q. Why was this marked "duplicate" if you know?

A. For the reason that one might have been given for one of these cars and I did not want to issue another original on any of the cars. Of course these bills are negotiable, and I did not want to put out two receipts for the same car.

Q. Do you know that this duplicate was issued by you at the re-

quest of some one connected with the S. Y. Hyde Elevator Company for the purpose of preferring a claim for this barley which was lost?

A. I remember Mr. Clark being in there and discussing the question of receipts. I don't just remember this receipt, but I remember the circumstance.

Q. To your knowledge had Mr. Clark ever made out original receipts when barley had been delivered from the S. Y. Hyde Elevator Company?

A. No, sir.

Q. Where were they usually made out?

A. At the station by the company.

Q. When there were any made out?

A. Yes, sir.

289 Examination by Mr. WARREN:

Q. I do not understand you to testify that this particular receipt was made out by the company, do I?

A. No, sir.

Q. Have you any specific recollection of this certain receipt?

A. Yes, sir; I remember that the question came up at the time when he asked for the original bills, that is original receipts, and the question at that time arose whether any original receipts had been issued or not. They are very irregular in their asking for receipts. They probably do not take a receipt for one out of twenty-five or thirty or forty cars. It is very seldom that they ask for any receipts or bills of lading, and of these station receipts I keep no record, and there might have been a receipt issued for some of these cars.

Q. Did they make any objection to your putting the word "duplicate" on this receipt?

A. I know there was objection, because they did not know that the duplicate receipt would answer, but I declined to issue anything else.

By Mr. HANSON:

Q. Did he at that time state for what he wanted it?

A. Yes, sir; it was for the purpose of establishing a claim.

J. C. HEITBAHN.

EXHIBIT A.

Exhibit A to Testimony of J. C. Heilbahn—Blank Shipping Bill.

Chicago, Milwaukee & St. Paul railway.

Station agents will require parties loading cars, to furnish an account of the same on these blanks, and so far as practicable, require the same of all parties delivering freight for shipment. It must be done without fail in all cases when property is such as per their tariffs, the company transports at owner's risk.

These shipping bills must be carefully preserved for reference.

All car-load freight shall be subject to a minimum charge for tracknage and rental of $1.00 per car for each 24 hours' detention or fractional part thereof after the expiration of 48 hours from its arrival at destination, and after the expiration of 72 hours, this company shall be at liberty to unload and store the freight in a warehouse of its own or unload and deliver to a warehouseman, and the consignor or consignee shall pay the C., M. & St. P. R'y Company the expense of unloading and warehousing same, and for such expense this company shall have a lien upon the freight in addition to its own freight charges and back charges.

Form 69.

Shipping Bill.

Delivered to the Chicago, Milwaukee & St. Paul R'y Co., at —— station, ——, 189–, to be forwarded, subject to the terms and conditions of its published freight tariffs, the property described below, marked and consigned to ——.

No. of car.	Description of articles.	Weight.

—— ——, *Shipper.*

290

EXHIBIT "B."

LA CROSSE, WIS., —— —, 189–.

DEAR SIR: We ship you today the following cars:

Car No.	Grain.	Grade.	Weight.	Remarks.

Yours truly,

W. W. CARGILL CO.

EXHIBIT "C."

LA CROSSE, WIS., —— —, 189–.

We ship you today the following:

Car No.	Grain.	Grade.	Weight.	Remarks.

S. Y. HYDE ELEVATOR CO.

1885

269

CHICAGO, MILWAUKEE & ST. PAUL RAILWAY,

ROCK ISLAND & PEORIA RAILWAY

AND

JACKSONVILLE SOUTH-EASTERN LINE.

JOINT TARIFF.

Agents not provided with instructions regarding billing of Cleaned Barley, will apply to W. F. Dudley, Freight Auditor.

Issued June 21, 1893. Taking Effect June 26, 1893.

	FROM	Rates in Cents per 100 Pounds. TO EAST ST. LOUIS. FLAX SEED. C. L.	EAST ST. LOUIS. Wheat, Corn, Rye, Oats, Flour and Millstuffs, C. L.	ST. LOUIS. FLOUR. C. L.
	Minneapolis ..... Minn.	17	16	16
	Minnesota Transfer ..... "	17	16	16
	*Merriam Park ..... "	17	16	16
	Macalester ..... "	17	16	16
	St. Paul ..... "	17	16	16
	Newport ..... "	17	16	16
	Langlon ..... "	17	16	16
	Hastings ..... "	17	16	16
	*Point Douglas ..... "	17	16	16
	Afton ..... "	17	16	16
	Lakeland ..... "	17	16	16
	South Stillwater ..... "	17	16	16
	Stillwater ..... "	17	16	16
River Division.	Etter ..... "	17	16	16
	Eggleston ..... "	17	16	16
	Red Wing ..... "	17	16	16
	Frontenac ..... "	17	16	16
	Lake City ..... "	17	16	16
	*Kings Cooley ..... "	17	16	16
	Read's Landing ..... "	17	16	16
	Wabasha ..... "	17	16	16
	Kellogg ..... "	17	16	16
	Weaver ..... "	17	16	16
	Minneiska ..... "	17	16	16
	Minnesota City ..... "	16	16	16
	Winona ..... "	16	16	16
	*Homer ..... "	16	16	16
	La Moille ..... "	16	16	16
	Dakota ..... "	16	16	16
	Dresbach ..... "	16	16	16
	River Junction ..... "	16	16	16
	La Crosse ..... Wis.	16	16	16

* Prepaid Stations.

FROM		Rates in Cents per 100 Pounds. TO EAST ST. LOUIS. FLAX SEED, C. L.	EAST ST. LOUIS. Wheat, Corn, Rye, Oats, Flour and Millstuffs, C. L.	ST. LOUIS. FLOUR, C. L.
Dubuque Division.				
Brownsville	Minn.	16	16	16
Reno	"	16	16	16
New Albin	Iowa	16	16	16
*Kains	"	16	16	16
Lansing	"	16	16	16
*Heytman's	"	16	16	16
Harper's Ferry	"	16	16	16
Waukon Junction	"	16	16	16
McGregor	"	16	16	16
Prairie du Chien	Wis.	16	16	16
*Soy Magill	Iowa	16	16	16
Clayton	"	16	16	16
*Eckards	"	16	16	16
Guttenberg	"	16	16	16
*Turkey River Junction	"	16	16	16
Turkey River	"	16	16	16
Buena Vista	"	16	16	16
*Waupeton	"	16	16	16
*Cameron	"	16	16	16
Specht's Ferry	"	16	16	16
*Edmore	"	16	16	16
*Eagle Point	"	13½	12½	12½
Dubuque	"	13½	12½	12½
*Massey	"	13½	12½	12½
*Smiths	"	13½	12½	12½
Gordon's Ferry	"	13½	12½	12½
Bellevue	"	13½	12½	12½
*Pleasant Creek	"	13½	12½	12½
Green Island	"	13½	12½	12½
*Lainsville	"	13½	12½	12½
Cascade	"	18	15	16
*Fillmore	"	18	15	16
Bernard	"	18	15	16
*Washington Mills	"	18	15	16
Zwingle	"	17	15	16
La Motte	"	16	15	16
*Paradise	"	16	15	16

* Prepaid Stations.

1887

271

Exhibit D.

293

RECEIPT NO. 1038.

Supplement No. 5 to Joint Tariff { C., M. & St. P. G. F. D. No. 7879. R. I. & P. Joint Tariff No. C-172. J. S.-E. Line No. 1804.

Cancels all previous Supplements and Amendments.

Chicago, Milwaukee & St. Paul Railway,

Rock Island & Peoria Railway,

Chicago, Peoria & St. Louis Railway

C. H. BOSWORTH, Receiver.

Supplement to above named tariff issued June 21, 1893, covering rates on Flax Seed, Flour and Grain, in carloads, from stations in Iowa, Minnesota and South Dakota, to East St. Louis, Ill., and St. Louis, Mo.

Wheat, Flour and Millstuffs, in carloads.

Issued February 24, 1896. **Effective March 6, 1896.**

To East St. Louis, Ill. from		Rate in Cents per 100 lbs.
River Division.	Minneapolis	Minn.	18½
	Minnesota Transfer	"	
	*Merriam Park	"	
	Macalester	"	
	St. Paul	"	
	Newport	"	
	Langdon	"	
	Hastings	"	
	*Point Douglas	"	
	Afton	"	
	Lakeland	"	
	South Stillwater	"	
	Stillwater	"	
	Etter	"	
	Eggleston	"	
	Red Wing	"	
	Frontenac	"	
	Lake City	"	
	Kings Cooley	"	
	Read's Landing	"	
	Wabasha	"	
	Kellogg	"	
	Weaver	"	
	Minneiska	"	
	Minnesota City	"	
	Winona	"	
	Homer	"	
	LaMoille	"	

Cancelled

To East St. Louis, Ill., from		Rate in Cents per 100 lbs.
River Div.	Dakota	Minn.	18½
	Dresbach	"	
	River Jct.	"	
La Crosse Div.	La Crosse	Wis.	
La Crosse Div.	Houston	Minn.	
Dubuque Division.	Brownsville	"	
	Reno	"	
	New Albin	Iowa	
	*Kains	"	
	Lansing	"	
	*Heytman's	"	
	Harper's Ferry	"	
	Waukon Jct	"	
	McGregor	"	
Prairie du Chien Div.	Prairie du Chien	Wis.	
Dubuque Division.	*Soy Magill	Iowa	
	Clayton	"	
	*Eckards	"	
	Guttenberg	"	
	*Turkey River Jct.	"	
	Turkey River	"	
	Buena Vista	"	
	*Waupeton	"	
	*Cameron	"	
	Specht's Ferry	"	
	*Edmore	"	

Cancellation Notice.

The rate on Flour in carloads, from stations on River, La Crosse, Prairie du Chien and Dubuque Divisions named above to St. Louis, Mo., is withdrawn and canceled.

*Prepaid station.

Originally in Ans. 1—Effective May 15 91.

BARLEY, in carloads.

	From	To East St. Louis, Ill.	To St. Louis, Mo.
		Rates in cents per 100 lbs.	
Iowa Division	Waterville ..... Iowa	16	16
	Waukon ..... "	16	16
Iowa & Dakota Division	*Ventura ..... "	19	..
	Britt ..... "	20	..
	Hutchins ..... "	20	..
	Wesley ..... "	20	..
	Sexton ..... "	20	..
Dubuque Division	*Freeburg ..... "	17	17
	Calvonia ..... "	17	17
	Spring Grove ..... "	17	17
	Newhouse ..... "	17	17
	Mabel ..... "	17	17
	*Donald's Switch ..... "	17	17
	Prosper ..... "	17	17
	Canton ..... "	17	17
	Harmony ..... "	17	17
	*Hutton ..... "	17	17
	Preston ..... "	17	17

Barley from stations named below may be cleaned in transit for East St. Louis, Ill., or †St. Louis, Mo., as follows:

From	To be cleaned at	At what rates.	How to way-bill.
Stations on Dubuque Division named above	Lansing ..... Iowa McGregor ..... " Dubuque ..... " Savanna ..... Ill.	Current rate from shipping station to destination	Way-bill to cleaning station at through rate.
	Prairie du Chien, Wis.	$2.00 per car Bridge Toll above current rate, from shipping station to destination	Way-bill to Prairie du Chien, Wis., at through rate, plus $2.00 Bridge Toll.
Stations on Southern Minnesota Division, Easton to Pipestone, Minn., and Mankato Branch	Grand Meadow .. Minn.	Current rate from shipping station to destination	Way-bill to the cleaning station at through rate.
	NOTE.—Billing Agents must note on way-bill "Weigh at Wells, Minn." Freight charges must be computed on basis of Wells weights.		
Stations in Wisconsin, Iowa, Minnesota and South Dakota, named on pages 4, 5, 6 and 8 of above tariff, except stations on C. & C. B. Division south of Delmar Jct. and Oxford Jct., Iowa	Savanna ..... Ill.	Direct rate from shipping station to destination, except on shipments from stations on page 8, where rates given on that page will apply	Way-bill to the cleaning station at the through rate.

*Prepaid station.

†Applies only in cases where rates are provided for in tariff to St. Louis, Mo.

Correct Billing Instructions on pages 3 and 6 of Joint Tariff C., M. & St. P. G. F. D. No. 7579 R. I. & P. Joint No. C-172, J. S.-E. Line No. 1804, as follows:

Direct shipments for East St. Louis, Ill., or St. Louis, Mo., must be way-billed through to East St. Louis, Ill., via Rock Island, Ill., at through rates in effect to East St. Louis or St. Louis. Shipments from points Oxford Jct. to Paralta, inclusive; Wyoming to Jackson Jct., inclusive; Springville to Farley, inclusive; and stations south of and including Oxford Mills and Maquoketa, Iowa, must be routed via Davenport, Iowa, and will be delivered to the R. I. & P. R'y at Rock Island, Ill.

Attach to and make part of Joint Tariff { C., M. & St. P. G. F. D. No. 7579. / R. I. & P. Joint No. C-172. / J. S.-E. L. No. 1804.

J. H. Hiland,
General Freight Agent,
C., M. & St. P. R'y, Chicago, Ill.

R. Stockhouse,
General Freight Agent,
R. I. & P. R'y, Rock Island, Ill.

W. M. Bushnell,
General Freight Agent,
C., P. & St. L. R'y, St. Louis, Mo.

1890

296 *Exhibit D.* 274

RECEIPT NO. 7047.

Supplement No. 6 to Joint Tariff { C., M. & St. P. G. F. D. No. 7579. / R. I. & P. Joint Tariff No. C-172. / J. S.-E. Line No. 1804.

Chicago, Milwaukee & St. Paul Railway.

Rock Island & Peoria Railway,

Chicago, Peoria & St. Louis R'y { C. H. BOSWORTH, Receiver.

Supplement to above named tariff, issued June 21, 1893, covering rates on Flax Seed, Flour and Grain, in carloads, from stations in Iowa, Minnesota and South Dakota, to East St. Louis, Ill., and St. Louis, Mo.

Issued September 14, 1896. **Effective September 19, 1896.**

Barley from stations named below may be cleaned in transit for East St. Louis, Ill., or †St. Louis, Mo., as follows:

From	To be Cleaned at	At what rates.	How to way-bill.
Stations on Southern Minnesota Division, Ramsey to and including Pipestone, Minn.; Iowa & Minnesota Division, Conover, Iowa, to and including Blooming Prairie, Minn.; Varco, Minn. to and including Plymouth Jct., Iowa, also Decorah, Iowa; Iowa & Dakota Division, Calmar, Iowa, to and including Mitchell and Running Water, S. Dak., also Spirit Lake Branch; Chicago & Council Bluffs Division, Oakton to and including Oxford Mills, Iowa.	Davenport, Iowa.	One cent per 100 lbs. higher than direct rate from shipping station to destination.	Way-bill to Davenport, Iowa, at the through rate plus one cent per 100 lbs.

Canceled

†Applies only in cases where rates are provided for in tariff to St. Louis, Mo.

Agent at Davenport, Iowa, must apply to the Freight Auditor for instructions regarding the way-billing of the cleaned Barley.

Attach to and make part of above named tariff.

J. H. Hilard,
General Freight Agent,
C., M. & St. P. R'y, Chicago.

R. Stockhouse,
General Freight Agent,
R. I. & P. R'y, Rock Island, Ill.

W. H. Bushnell,
General Freight Agent,
C., P. & St. L. R'y, St. Louis, Mo.

1000

1891

275

Routing and Billing Instructions on Shipments from Points on Pages 1 and 2.

Direct Shipments for East St. Louis, Ill., will be way-billed through via Rock Island, Ill. Direct Shipments for St. Louis, Mo., will be way-billed through to East St. Louis, Ill., via Rock Island, Ill., at 1½c per 100 lbs. less than through rates.

Wheat, in car loads, from St. Paul, Minneapolis, or Minnesota Transfer, Minn., to East St. Louis, Ill., or St. Louis, Mo., may be milled in transit at Winona, Minn., at rate of 18½c per 100 lbs. Way-bill to Winona, Minn., at the through rate.

Wheat, in car loads, from St. Paul, Minneapolis, or Minnesota Transfer, Minn., to East St. Louis, Ill., or St. Louis, Mo., may be milled in transit at La Crosse, Wis., at rate of 18½c per 100 lbs., plus $2.00 for La Crosse Bridge Tolls. Way-bill to La Crosse, Wis., at the through rate, plus $2.00 Bridge Toll.

OATS, IN CAR LOADS.

	TO ST. LOUIS, MO. FROM	In Cents per 100 lbs.
Iowa & Minnesota Div.	Conover.....Iowa	15
	Decorah..... "	15
	Ridgeway..... "	15
	Cresco..... "	16
	*Bonair..... "	16
	Lime Springs..... "	16
	Chester..... "	16
	Leroy.....Minn.	16
	Taopi..... "	16
	Adams..... "	16
Iowa & Dakota Div.	Postville.....Iowa	15
	Castalia..... "	15
	Ossian..... "	15
	Calmar..... "	15
	Ft. Atkinson..... "	15
	Lawler..... "	15
	New Hampton..... "	15
	Ionia..... "	15½

	TO ST. LOUIS, MO. FROM	In Cents per 100 lbs.
Chicago & Council Bluffs Div.	Oxford Junc.....Iowa	15
	Hale..... "	15
	Olin..... "	15
	Morley..... "	15
	Martelle..... "	15
	Paralta..... "	15
	Wyoming..... "	15
	Centre Junc..... "	15
	Scotch Grove..... "	15
	Monticello..... "	15
	Hopkinton..... "	15
	Delhi..... "	15
	Delaware..... "	15
	Greeley..... "	15
	Edgewood..... "	15
	Strawberry Point..... "	15

	TO ST. LOUIS, MO. FROM	In Cents per 100 lbs.
Chicago & Council Bluffs Div.	Brush Creek.....Iowa	15
	Fayette..... "	15
	Hawkeye..... "	15
	Waucoma..... "	15
	Jackson Junc..... "	15
	Springville..... "	15
	Viola..... "	15
	Stone City..... "	15
	Anamosa..... "	15
	Langworthy..... "	15
	Sand Spring..... "	15
	Worthington..... "	15
	Farley..... "	15

* Prepaid Stations.

Way-bill through to East St. Louis, Ill., via Rock Island, Ill., at 1½c per 100 lbs. less than through rates. (Shipments from points Oxford Junc. to Paralta, inclusive, Wyoming to Jackson Junc. inclusive, and Springville to Farley, inclusive, will be routed via Davenport, Iowa, and delivered to the R. I. & P. R'y at Rock Island, Ill.)

1892

276

BARLEY, IN CAR LOADS.

Rates in Cents per 100 Pounds.

	FROM		TO East St. Louis	TO St. Louis
River Division.	Minneapolis	Minn.	17	17
	Minnesota Transfer	"	17	17
	*Merriam Park	"	17	17
	Macalester	"	17	17
	St. Paul	"	17	17
	Newport	"	17	17
	Langdon	"	17	17
	Hastings	"	17	17
	*Point Douglas	"	17	17
	Afton	"	17	17
	Lakeland	"	17	17
	South Stillwater	"	17	17
	Stillwater	"	17	17
	Etter	"	17	17
	Eggleston	"	17	17
	Red Wing	"	17	17
	Frontenac	"	17	17
	Lake City	"	17	17
	*Kings Cooley	"	17	17
	Read's Landing	"	17	17
	Wabasha	"	17	17
	Kellogg	"	17	17
	Weaver	"	17	17
	Minneiska	"	17	17
	Minnesota City	"	17	17
	Winona	"	17	17
	*Homer	"	17	17
	La Moille	"	17	17
	Dakota	"	17	17
	Dresbach	"	17	17
	River June	"	17	17
	La Crosse	Wis.	16	16
Southern Minnesota Division.	La Crescent	Minn.	16	16
	Hokah	"	17	17
	*Mound Prairie	"	17	17
	Houston	"	17	17
	*Money Creek	"	17	17
	Rushford	"	17	17
	Peterson	"	17	17
	Whalan	"	17	17
	Lanesboro	"	17	17
	Isinours	"	17	17
	Fountain	"	17	17
	Wykoff	"	17	17
	Spring Valley	"	17	17
	Grand Meadow	"	17	17
	Dexter	"	17	17
	Brownsdale	"	17	17
Southern Minnesota Division.	Ramsey	Minn.	17	17
	Oakland	"	17	17
	Hayward	"	17	17
	Albert Lea	"	17	17
	Armstrong	"	17	17
	Alden	"	18	18
	*Evans	"	18	18
	Wells	"	18	18
	Minnesota Lake	"	18	18
	Mapleton	"	18	18
	Good Thunder	"	18	18
	Rapidan	"	18	18
	Mankato	"	18	18
	Easton	"	19	19
	Delavan	"	20	20
	Winnebago City	"	21	21
	Huntley	"	21	21
	Fairmont	"	22	22
	Welcome	"	22	22
	Sherburn	"	22	22
	Jackson	"	22	22
	Lakefield	"	22	22
	*Okabena	"	22	22
	Prairie Junction	"	22	22
	Kinbrae	"	23	23
	Fulda	"	23	23
	Iona Lake	"	23	23
	Chandler	"	23	23
	Edgerton	"	23	23
	Hatfield	"	23	23
	Pipestone	"	23	23
Dubuque Division.	Brownsville	"	16	16
	Reno	"	16	16
	New Albin	Iowa	16	16
	*Kains	"	16	16
	Lansing	"	16	16
	*Heytman's	"	16	16
	Harper's Ferry	"	16	16
	Waukon June	"	16	16
	McGregor	"	15	15
	Prairie du Chien	Wis.	16	16
	*Soy Magill	Iowa	15	15
	Clayton	"	15	15
	*Eckards	"	15	15
	Guttenberg	"	15	15
	*Turkey River June	"	15	15
	*Millville	"	15	
	*Schrunks	"	15	

* Prepaid Stations.

BARLEY, IN CAR LOADS.

Rates in Cents per 100 Pounds.

	FROM	TO East St. Louis	TO St. Louis
Dubuque Division.	Osterdock ..... Iowa	15	..
	Elkport ..... "	15	..
	Littleport ..... "	15	..
	Medersville ..... "	15	..
	*Osborne ..... "	15	..
	Volga City ..... "	15	..
	Wadena ..... "	15	..
	*Lima ..... "	15	..
	West Union ..... "	15	..
	Turkey River ..... "	15	15
	Buena Vista ..... "	15	15
	*Waupeton ..... "	15	15
	*Cameron ..... "	15	15
	Specht's Ferry ..... "	15	15
	*Edmore ..... "	15	15
	*Eagle Point ..... "	12½	12½
	Dubuque ..... "	12½	12½
	*Massey ..... "	12½	12½
	Gordon's Ferry ..... "	12½	12½
	Bellevue ..... "	12½	12½
	*Pleasant Creek ..... "	12½	12½
	Green Island ..... "	12½	12½
	*Lainsville ..... "	12½	12½
Iowa and Minnesota Division.	Cascade ..... "	15	16
	*Filimore ..... "	15	16
	Bernard ..... "	15	16
	*Washington Mills ..... "	15	16
	Zwingle ..... "	15	16
	La Motte ..... "	15	16
	*Paradise ..... "	15	16
	Conover ..... "	15	15
	Decorah ..... "	15	15
	Ridgeway ..... "	15	15
	Cresco ..... "	16	16
	*Bonair ..... "	16	16
	Lime Springs ..... "	16	16
	Chester ..... "	17	17
	Leroy ..... Minn.	17	17
	Taopi ..... "	17	17
	Adams ..... "	17	17
	Rose Creek ..... "	17	17
	Austin ..... "	17	17
	*Varco ..... "	17	17
	Lyle ..... "	17	17
	Otranto ..... Iowa	17	17
	Carpenter ..... "	17	17
	Grafton ..... "	17	17
	Plymouth ..... "	17	17

	FROM	TO East St. Louis	TO St. Louis
Iowa and Minnesota Div.	*Plymouth June. ..... Minn.	17	17
	Lansing ..... "	17	17
	Blooming Prairie ..... "	17	17
	Bixby ..... "	17	..
	Pratt ..... "	17	..
	Owatonna ..... "	17	..
	Medford ..... "	17	..
	*Wabott ..... "	17	..
Iowa and Dakota Division.	*Welsh ..... Minn.	17	17
	Cannon Falls ..... "	17	17
	*Randolph ..... "	17	17
	*Wallace ..... "	17	17
	*Waterford ..... "	17	17
	Northfield ..... "	17	17
	Dundas ..... "	17	17
	Faribault ..... "	17	17
	*Guard ..... Iowa	15	..
	Beulah ..... "	15	..
	Froelich ..... "	15	..
	*Bismarck ..... "	15	..
	Farmersburg ..... "	15	..
	St. Olaf ..... "	15	..
	Elkader ..... "	15	..
	Monona ..... "	15	..
	Luana ..... "	15	..
	*Ridley ..... "	15	..
	Postville ..... "	15	..
	Castalia ..... "	15	..
	Ossian ..... "	15	..
	Celmar ..... "	15	..
	Ft. Atkinson ..... "	15	..
	Lawler ..... "	15	..
	New Hampton ..... "	15	..
	Ionia ..... "	15½	..
	Bassett ..... "	16	..
	*Doubleday ..... "	16	..
	Charles City ..... "	16	..
	Floyd Crossing ..... "	16	..
	Rudd ..... "	17	..
	Nora Springs ..... "	17	..
	Nora June ..... "	17	..
	Portland ..... "	17	..
	Mason City June ..... "	17	..
	Mason City ..... "	17	..
	Clear Lake ..... "	18	..
	*Ventura ..... "	18	..
	Garner ..... "	19	..
	*Duncan ..... "	19	..

Rates as Eng. Dep.

* Prepaid Stations.

BARLEY, IN CAR LOADS.

Rates in Cents per 100 Pounds.

FROM		TO East St. Louis	TO St. Louis
Iowa & Dakota Division.			
Britt	Iowa	19	..
*Hutchins	"	19	..
Wesley	"	19	..
Sexton	"	19	..
Algona	"	20	..
Hobart	"	20	..
Whittemore	"	20	..
Cylinder	"	20	..
Emmetsburg	"	20	..
*Crippen	"	20	..
Ruthven	"	20	..
Dickens	"	20	..
Spencer	"	20	..
Milford	"	20	..
*Arnold's Park	"	20	..
*Lakes Okoboji	"	20	..
Spirit Lake	"	20	..
Everly	"	21	..
Hartley	"	21	..
*Waneta	"	21	..
Sanborn	"	22	..
Sheldon	"	22	..
Boyden	"	22	..
Hull	"	22	..
Rock Valley	"	22	..
Inwood	"	22	..
Canton	S. Dak.	22	..
Worthing	"	23	..
Lennox	"	24	..
Parker	"	25	..
Marion June	"	25	..

FROM		TO East St. Louis	TO St. Louis
Iowa & Dakota Division.			
Freeman	S. Dak.	26	..
Menno	"	27	..
*Tuscan	"	27	..
Scotland	"	27	..
Tyndall	"	28	..
Springfield	"	29	..
Running Water	"	30	..
*Dolton	"	25	..
Bridgewater	"	25	..
Emery	"	25	..
Alexandria	"	26	..
*Burton	"	27	..
Mitchell	"	27	..
Chicago & Council Bluffs Division.			
Oakton	Iowa	13	..
*Mt. Joy	"	13	..
Eldridge June	"	13	..
Donahue	"	13	..
Dixon	"	13	..
Big Rock	"	13	..
Wheatland	"	13	..
Toronto	"	13	..
Massillon	"	13	..
Oxford Mills	"	13	..
Long Grove	"	13	..
*Noel Station	"	13	..
De Witt	"	13	..
Welton	"	13	..
Delmar June	"	13	..
Maquoketa	"	13	

* Prepaid Stations.

Routing and Billing Instructions on Shipments from Points on Pages 4, 5 and 6.

Direct shipments for East St. Louis, Ill., will be way-billed through via Rock Island, Ill.

Direct shipments for St. Louis, Mo., will be way-billed through to East St. Louis, Ill., via Rock Island, Ill., at 1½ cents per 100 lbs. less than through rates. (Shipments from stations south of and including Oxford Mills and Maquoketa, will be routed via Davenport, Ia., and delivered to the R. I. & P. R'y at Rock Island, Ill.)

1895

279

Barley from stations named on pages 4, 5 and 6, may be cleaned in transit for East St. Louis, Ill. or St. Louis, Mo. (where rates are provided for in tariff to St. Louis), as follows:

From Stations on	To be Cleaned at	At what Rate	How Way-Billed
River Division, North of cleaning point...	Red Wing ....Minn. Wabasha ..... " Winona ..... " Lansing .....Iowa	Current rate, from shipping point to destination	Way-Bill to cleaning point at through rate.
Iowa & Minnesota Division, Welsh to Faribault, Minn., inclusive (via Red Wing)	McGregor ..... " Dubuque ..... " Savanna .....Ill.		
	La Crosse.....Wis. Prairie du Chien.. "	$2.00 per car Bridge Toll above current rate, from shipping point to destination.....	Way-Bill to La Crosse, or Prairie du Chien, Wis., at through rate, plus $2.00 per car Bridge Toll.
Southern Minnesota Division.....	McGregor .....Iowa	Current rate, from shipping point to destination	Way-Bill to McGregor, Iowa, at through rate.
	La Crosse or Prairie du Chien, Wis.....	$2.00 per car Bridge Toll above current rate, from shipping point to destination	Way-Bill to La Crosse or Prairie du Chien, Wis., at through rate, plus $2.00 per car Bridge Toll.
Dubuque Division North of cleaning point	Lansing .....Iowa McGregor ..... " Dubuque ..... " Savanna .....Ill.	Current rate, from shipping point to destination	Way-Bill to cleaning point at through rate.
Iowa & Minnesota Division, Conover, Iowa, to Walcott, Minn., inclusive, when destined East St. Louis, Ill.....	McGregor .....Iowa	Current rate, from shipping point to destination	Way-Bill to McGregor, Iowa, at through rate.
	Prairie du Chien. Wis.	$2.00 per car Bridge Toll above current rate, from shipping point to destination.....	Way-Bill to Prairie du Chien, Wis., at through rate, plus $2.00 Bridge Toll.
Iowa & Minnesota Division, Conover, Iowa, to Blooming Prairie, Minn., inclusive, when destined St. Louis, Mo.	McGregor .....Iowa Dubuque ..... " Savanna .....Ill.	Current rate, from shipping point to destination	Way-Bill to cleaning point at through rate.
	Prairie du Chien. Wis.	$2.00 per car Bridge Toll above current rate, from shipping point to destination	Way-Bill to Prairie du Chien, Wis., at through rate, plus $2.00 Bridge Toll.
Iowa & Dakota Division.....	McGregor ..... Iowa	Current rate, from shipping point to destination	Way-Bill to McGregor, Iowa, at through rate.
	Prairie du Chien. Wis.	$2.00 per car Bridge Toll above current rate, from shipping point to destination.....	Way-Bill to Prairie du Chien, Wis., at through rate, plus $2.00 Bridge Toll.



1896

280

302

Exhibit D.

C. M. & St. P. G. F. D. No. 7579—1893.
R. I. & P. Joint Tariff No. C. 172.
J. S.-E. Line No. 1904.

Canceling

C. M. & St. P. G. F. D. No. 5830—1891
R. I. & P. Joint Tariff No. C. 117.
J. S.-E. Line No.
Wabash No. 5205.

BARLEY, IN CAR LOADS,

FROM

STATIONS NAMED BELOW

TO

ST. LOUIS, MISSOURI,

May be Cleaned in Transit at McGREGOR, IOWA, at the following rates:

(See also Foot Note.)

	FROM	In Cents per 100 lbs.
Iowa & Dakota Division.	*Giard ..... Iowa	15
	Beulah ..... "	15
	Froelich ..... "	15
	*Bismarck ..... "	15
	Farmersburg ..... "	15
	St. Olaf ..... "	15
	Elkader ..... "	15
	Monona ..... "	15
	Luana ..... "	15
	*Ridley ..... "	15
	Postville ..... "	15
	Castalia ..... "	15
	Ossian ..... "	15
	Calmar ..... "	15
	Ft. Atkinson ..... "	15
Iowa & Dakota Division.	Lawler ..... Iowa	15
	New Hampton ..... "	15
	Ionia ..... "	15½
	Bassett ..... "	16
	*Doubleday ..... "	16
	Charles City ..... "	16
	Floyd Crossing ..... "	16
	Rudd ..... "	17
	Nora Springs ..... "	17
	Nora June ..... "	17
	Portland ..... "	17
	Mason City June ..... "	17
	Mason City ..... "	17
	Clear Lake ..... "	19
Iowa & Dakota Division.	*Ventura ..... Iowa	20
	Garner ..... "	21
	*Duncan ..... "	21
	Britt ..... "	21
	*Hutchins ..... "	21
	Wesley ..... "	21
	Sexton ..... "	21
	Algona ..... "	22
	*Hobart ..... "	22
	Whittemore ..... "	22
	Cylinder ..... "	22
	Emmetsburg ..... "	22
	*Crippen ..... "	22
	Ruthven ..... "	22

* Prepaid Stations.

Shipments of Barley from above stations for St. Louis may be cleaned in transit at Prairie du Chien, Wis., at $2.00 per car in addition to rates shown herein.

Shipments to be billed to the cleaning point at the through rate and the cleaned grain to be forwarded to St. Louis via Rock Island, Ill., R. I. & P. R'y, and J. S. E. Line.

NOTE.—In addition to rates provided for herein an additional charge of not less than $1.00 per day or fraction thereof will be charged on all car loads for detention at loading or unloading point beyond 48 hours.

Agents are prohibited from quoting or using a higher rate for a shorter than for a longer distance, over the same line in the same direction, the shorter being entirely included within the longer distance.

J. H. HILAND,
General Freight Agent,
C. M. & St. P. R'y, Chicago.

R. STOCKHOUSE,
General Freight Agent,
R. I. & P. R'y, Rock Island, Ill.

W. C. ALVORD,
General Freight Agent,
Jacksonville South Eastern Line, Jacksonville, Ill.

303 EXHIBIT "D."

Joint Tariff.

Joint tariff circular.

LA CROSSE, WIS., *Oct.* 11, 1895.

Mr. P. B. Warren to H. W. Thompson, Dr.

To notary's fees for taking depositions of E. J. Tull, S. Y. Hyde and J. C. Heitbahn, in case of Mercantile Trust Company, of New York, against Chicago, Peoria & St. Louis Railway Company.....	$9 36
Including stenographer's fees....	21 50
	$30 86

Received payment Oct. 19, 1895,

H. W. THOMPSON.

(Indorsed:) Filed October 14, 1895. James T. Jones, clerk.

Received at Chicago, Jan. 28th, 1896.

SPRINGFIELD, ILL.

To Burton Hanson, gen. sol. C., M. & St. P. R'y, Chicago:

February 4th will be convenient. See my letter written yesterday.

WILSON & WARREN.

SPRINGFIELD, ILL., *Jan.* 27, 1896.

Burton Hanson, Esq., general solicitor C., M. & St. P., Chicago, Illinois.

DEAR SIR: Replying to your favors of the 25th and 26th inst., in the matter of taking testimony at La Crosse, Wisconsin, I beg respectfully to say that the 4th of February will be convenient to us, and that I will meet you in La Crosse that morning at the same hotel where I met you before.

If for any reason you do not expect to be able to take the testimony of all the witnesses there, please advise me so that I can make arrangements to go with you to other points.

I enclose herewith the stipulation signed as requested by you.

Yours very truly, PHILIP BARTON WARREN.

304 E.

Stipulation as to Parties Taking Testimony.

In the Circuit Court of the United States in and for the Southern District of Illinois.

THE MERCANTILE TRUST COMPANY OF NEW YORK, Complainant,
vs.
CHICAGO, PEORIA & ST. LOUIS RAILROAD Company, Defendant.
} Consolidated Cause.

In the matter of the intervening petitions of the Carr, Ryder & Engler Company, Chicago, Milwaukee & St. Paul Railway Company, the S. Y. Hyde Elevator Company, the W. W. Cargill Company, Jacob Rau; James F. Gilchrist and Colin F. Bell, partners under the firm name of Gilchrist & Company, and Thomas McMichael and William McMichael, doing business under the firm name of McMichael & Son, and Henry Rippe, and Huntting Elevator Company.

It is stipulated by and between the parties to these proceedings that the testimony of the petitioners herein, W. W. Cargill Company, S. Y. Hyde Elevator Company, Jacob Rau, Gilchrist & Company, Huntting Elevator Company, T. McMichael & Son and Henry Rippe, in support of the allegations of facts stricken out of a certain stipulation entered into herein, dated August 27th, 1895, by an order of January 22nd, 1896, of this court, may be taken at the city of La Crosse, Wisconsin, before a notary public on the fourth day of February, A. D. 1896, at nine o'clock in the forenoon, and the taking thereof continued from day to day until the same shall be concluded, without formal notice thereof, and that the testimony taken under this stipulation may be received with the same force and effect as if taken before the master herein, and upon notice duly served.

BLUFORD WILSON,
P. W. WARREN,
Sol'c'rs for Receiver.

BURTON HANSON,
GEORGE P. CARY,
Sol'rs for Petitioners.

305 In the Circuit Court of the United States in and for the Southern District of Illinois.

THE MERCANTILE TRUST COMPANY OF NEW York, Complainant,
vs.
CHICAGO, PEORIA & ST. LOUIS RAILWAY COMpany, Defendant.
} Consolidated Cause.

In the matter of the intervening petitions of the Carr, Ryder & Engler Company, Chicago, Milwaukee & St. Paul Railway Company, the S. Y. Hyde Elevator Company, the W. W. Cargill Company, Jacob Rau; James N. Gilchrist and Colin F. Bell, partners under the firm name of Gilchrist & Company; the Huntting Elevator Company, Thomas McMichael and William McMichael, under the firm name of McMichael & Son, and Henry Rippe.

It is stipulated by and between the parties to these proceedings that in pursuance of a stipulation heretofore entered into, which is attached to these depositions, the testimony of W. W. Cargill, in behalf of the W. W. Cargill Company; S. Y. Hyde, in behalf of the S. Y. Hyde Elevator Company; Jacob Rau, Mr. James N. Gilchrist, in behalf of Gilchrist & Company; J. H. Ellsworth, in behalf of the Huntting Elevator Company; William McMichael, in behalf of T. McMichael & Son, and Henry Rippe, may be taken herein before M. C. Lightbody, a notary public in and for the State of Wisconsin, residing at La Crosse, Wisconsin, at this time, to wit: the 4th day of February, A. D. 1896, at nine o'clock a. m., with the same force and effect as if the depositions of such persons had been taken on written notice duly given therefor; that the signatures of such persons whose depositions are so taken *is* hereby waived, and that such depositions when taken may be sent by mail to Mr. James T. Jones, clerk of the above-named court, at Springfield, Illinois, and that when so received and filed by him may be taken and read in evidence with the same force and effect as if taken before Mr. Stuart Brown, the master herein, upon notice duly given.

On the 4th day of February, A. D. 1896, before M. C. Lightbody, the notary public above named, at the office of Losey & Woodward, in the city of La Crosse, county of La Crosse, and State of Wisconsin, appeared Mr. Burton Hanson, as attorney for the above-named petitioners, and Mr. Philip Barton Warren the attorney for
306 the said railway company, and the receiver, Mr. C. H. Bosworth, and after making and consenting to the foregoing stipulation, the following proceedings were had:

Testimony of James N. Gilchrist.

Mr. JAMES N. GILCHRIST, being first duly sworn, testified as follows:

Direct examination by Mr. HANSON:

Q. Mr. Gilchrist, you reside at McGregor, Iowa?
A. Yes, sir.

Q. And you are a member of the firm of Gilchrist & Company?
A. Yes, sir.
Q. One of the petitioners in these proceedings?
A. Yes, sir.
Q. The firm of Gilchrist & Company is in business at McGregor?
A. Yes, sir.
Q. On the 10th day of October, 1894, did Gilchrist & Company ship a car-load of barley consigned to Teichman Commission Company, St. Louis, St. Paul car No. 38108?
A. Our agent at Ossian did.
Q. Did Gilchrist & Company also ship on the 11th day of October a car-load of barley in St. Paul car No. 1154, consigned to Teichman & Company, St. Louis?
A. Yes, sir, we shipped in the same way through our agent at Ossian.
Q. Both of these cars of barley were consigned to St. Louis to this commission firm?
A. They were.
Q. Under what arrangement, Mr. Gilchrist, was this barley in these two cars shipped?
A. It was shipped to fill a sale made to Teichman & Company.
Q. What were the terms of that sale?
A. The terms of the sale were that they were to pay us——

Mr. WARREN: I object if the terms were in writing.

Q. What were the terms of that sale?
A. The terms of the sale were that they were to pay us 55½ cents per bushel for five thousand bushels of barley delivered in St. Louis.
Q. Was the barley in these two cars, as above stated, shipped to fill that order?
307 A. They were.
Q. What was the arrangement with reference to the payment of freight from the point of shipment to St. Louis?
A. We were to deliver the barley in St. Louis.
Q. You to pay the freight?
A. We were to pay the freight.
Q. Do you know whether this barley ever reached St. Louis?
A. Well, we had reports that the cars were burned at East St. Louis.

Mr. WARREN: I object to this testimony in reference to reports.

Q. When you received word or information that the barley contained in these two cars had been destroyed by fire at East St. Louis, what further was done by you toward filling this contract, which you had with Teichman & Company to deliver 5,000 bushels of barley at St. Louis?
A. Well, that identical sale was filled out of barley shipped to fill another sale made within a day or two, and afterwards, we shipped two cars besides in order to make up the deficiency in the second sale.

Q. Why were these two additional cars shipped, for what purpose?

A. We shipped them to deliver the barley, to make up the amount sold.

Q. To make up the amount of 85,000 bushels which you state you first sold?

A. Yes, sir; well—strictly it was to make up the barley that was taken out of the second sale.

Q. What was the barley taken out of the second sale for?

A. The barley that was shipped to fill the second sale, two cars of it was taken out to fill the first sale which we made.

Q. Why was that done?

A. It was done to deliver to them the necessary amount to fill the sale.

Q. Why was the amount necessary?

A. Because it was a part of the sale; we were to deliver them so much barley.

Q. That was the arrangement that you were to deliver to them five thousand bushels of barley?

A. Yes, sir.

Q. At St. Louis——

A. Yes, sir.

Q. And because these two cars were destroyed at East St. Louis, and never reached Teichman & Company, two other cars were shipped to St. Louis to complete your contract with reference to the 5,000 bushels?

308 A. Yes, sir; that is it.

Q. Is Gilchrist & Company still the owner of the claim arising out of the destruction of these two cars of barley at East St. Louis?

(Objected to.)

A. Yes, sir.

Q. Has any other firm or person or corporation any interest whatever in this barley which was destroyed at East St. Louis in these two *acres?*

A. No, sir.

Q. Has any other firm, person or corporation any interest in the claim which is presented on account of the destruction of this barley?

A. None whatever.

Q. Gilchrist & Company own the claim?

A. They own the claim.

Cross-examination by Mr. WARREN:

Q. You may state, Mr. Gilchrist, in what way this contract for the sale of 5,000 bushels of barley was made, whether verbally or in writing.

A. It was made by wire and letter.

Q. Have you the correspondence both by wire and mail in your possession?

A. I think I have that letter confirming the sale.
Q. Haven't you the original correspondence?
A. Yes, I have that letter.

(Letter produced and shown to counsel.)

Q. Then the first offer for the sale of this barley came from you?
A. Yes, sir—well, I don't know how the first negotiations commenced. We sometimes make them an offer and they accept.
Q. How did you make them that offer?
A. My impression is that we made it by wire.
Q. Have you got a copy of your message?
A. I haven't it with me.
Q. Can you produce a copy?
A. I think I can get one from the telegraph office.

Mr. WARREN: I will ask the witness to produce all the correspondence which took place between himself and the Teichman Commission Company relating to the negotiation and consummation of the sale of this barley.

309 Q. You say that the Teichman Commission Company took out of a subsequent shipment of barley which you made to them two cars to fill some deficiency in the first shipment?
A. Yes, sir.
Q. Upon whose authority did they take that out?
A. Well, I don't remember whether there was any authority granted to them or not. They accounted to us for the sale at 55½ cents; that included two sales one at 55½ cents and one at 56 as stated in the letter there. We ordered the first sale filled first, and it was out of the barley shipped to fill the first sale that these two cars were burned. We ordered the second sale filled by shipment from this same station Ossian, and they went along and accounted to us for the first sale at 55½ cents, taking two cars from the shipment made to fill the second sale.
—. They simply did that of their own volition; you did not instruct them to do it?
A. Not that I know of.
Q. Do you know, of your own personal knowledge, that this shipment was ever delivered to Teichman Commission Company.
A. I only know that they have not accounted to us for it.
Q. But do you know, of your own knowledge, whether it was delivered at St. Louis or not?
A. No.
Q. Did you notify the railroad company that you were the owner of this barley until it reached St. Louis?
A. No; I don't think we gave them any notice. We shipped the barley the same as we always do.
Q. It was consigned to Teichman Commission Company, not to your order?
A. It was not consigned to our order; it was consigned to Teichman and Company.
Q. Do you know, of your own knowledge, whether Teichman

Commission Company ever made any change in the destination of the barley?

A. I do not.

Q. This was a contract sale; they were not selling for you on commission, were they?

A. No, sir.

Redirect examination by Mr. HANSON:

Q. It was a sale, as you stated, to be delivered at St. Louis, freight paid?

A. It was.

Mr. WARREN: I want it to appear in the record that I object to all the testimony of this witness.

310 Q. This letter which you have produced from the Teichman Commission Company to you under date of October 8, 1894, is in answer to telegrams from you on the 6th and 8th of October, is it not?

A. My impression is it is telegrams; I am not quite certain.

Q. The letter says telegrams.

A. I am not quite certain.

Q. Have you a copy of those telegrams?

A. I have not, but I think I can get one at the telegraph office; there is very little doubt but what I can; I don't know that I can get the originals.

Q. You did not keep any copies of them yourself?

A. I generally do, or often do, but I could not find any copies of these. Sometimes we do and sometimes we do not.

The witness here states that he will use his best endeavors to get the originals of these telegrams, and, if he cannot get them, he will get copies, if they can be found, and, when he gets them, he will send them to the notary to be attached to his testimony.

He also states that he will produce any other correspondence which relates to the sale of this barley, and that such correspondence, when so produced, will be all which relates to such sale.

Question by Mr. HANSON:

Q. Mr. Gilchrist, you have been shipping from McGregor for a number of years, haven't you?

A. Yes, sir.

Q. Barley and other grain?

A. Yes, sir.

Q. Do you ever, when you deliver barley and other grains to the railroad company, notify the company in regard to the terms or arrangements of the sale of the property?

A. We do not.

Q. You never say anything about it, nor they to you?

A. No, sir.

Q. It is not customary at all, is it?

A. No, sir.

Q. And it is not the custom between your company and the railroad company doing your shipping?

A. No, sir; our agents do most of the shipping.

—. Mr. Gilchrist, I want to ask you what was the understanding between the Gilchrist Company and the Teichman Commission Company in reference to the ownership of this barley?

A. Well, we agreed to deliver the barley to them at St. Louis, a certain amount at a certain price.

Q. Was that understanding acted upon in making the shipments in question?

311 A. It was.

By Mr. WARREN: I object to that if that understanding is based upon any correspondence.

Mr. HANSON: Upon what was that understanding based?

A. Why, we have barley to sell; we invite bids one way; another way we make offers—both ways; sometimes they are accepted and trades result; very often no trade results. If we offer and the terms are satisfactory, they accept, then we proceed to ship the barley or any other grain which we have sold. If no trade results, then that is the end of it. If they offer us a certain price and we accept, we ship the barley to fill the terms of the sale.

Q. Now, what were the terms of the sale in reference to the place of the delivery of the barley?

A. I think our sales in St. Louis have been almost always delivered there; in fact I know they have. We never sold any barley in St. Louis to be delivered anywhere else.

Q. Was that understanding acted upon in the shipment of the barley in question?

A. It was.

Q. Acted upon both by Gilchrist & Company and the Teichman Commission Company?

A. We shipped it to them to be delivered at St. Louis, and that ended it as far as we were concerned.

By Mr. WARREN: I will ask you Mr. Gilchrist if you will state how the understanding which you have testified to was arrived at, whether verbally or by correspondence?

A. By telegrams and correspondence together I think.

Q. And you have stated that you would produce that correspondence?

A. I will do the best I can to do so.

(The following correspondence is attached to and made a part of this deposition of Mr. James N. Gilchrist pursuant to the statement of the witness, above made, that he would produce all the correspondence which took place between himself and the Teichman Commission Company in relation to the negotiation for and consummation of the sale of the barley referred to in said deposition.)

Received at McGregor, 10/6, 1894.
St. Louis, Mo.

Gilchrist & Co.:
Offer fifty-five one-half net sample five cars answer/
TEICHMAN COM. CO.

312 Dated McGregor, Iowa, Oct. 6, 1894.

Teichman Com. Co., St. Louis, Mo.:
We accept offer five cars sample/
GILCHRIST & CO.

Received at McGregor, Iowa.
Dated St. Louis, Mo., 10/8, 1894.

Gilchrist & Co.:
Route shipments via East St. Louis think could place five thousand more.
TEICHMAN COM. CO.

Dated McGregor, Oct. 8, 1894.

Teichman Com. Co., St. Louis:
Shipping directions received will sell five more fifty-six net.
GILCHRIST & COMPANY.

Received at McGregor 10/8, 1894.
Dated St. Louis, Mo.

Gilchrist & Co.:
Please wire quantity acceptance our bid state number of bushels.
TEICHMAN COM. CO.

Dated McGregor, Iowa, 10/8, 1894.

Teichman Commission Co., St. Louis, Mo.:
Make quantity five thousand bushels send billing directions.
GILCHRIST & CO.

Received at McGregor 10/8, 1894.
Dated St. Louis, Mo.

Gilchrist & Co.:
Accept five thousand more fifty-six net same shipping directions.
TEICHMAN COM. CO.

ST. LOUIS, Mo., *Oct. 8th*, 1894.

Messrs. Gilchrist & Company, McGregor, Iowa.

313 GENTLEMEN: We have your telegram of the 6th and 8th, and now confirm sale, 5,000 bushels your sample barley at 55½c. net, and 5,000 bushels your sample barley at 56c. net here, to be shipped via East St. Louis.

We expect to secure a good custom for this grade of barley, and hope to sell all you will have. Keep us advised of any more offerings, and oblige,

Yours truly, TEICHMAN COMMISSION CO.

ST. LOUIS, MO., *Nov.* 5, 1894.

Messrs. Gilchrist & Company, McGregor, Ia.

GENTLEMEN: We have your favor of the 2nd, and note contents. You will please ship the two cars barley to replace the two cars destroyed in the late fire.

We report a good demand for barley at unchanged prices, and request you to keep us advised of your offerings. We remain,

Yours truly, TEICHMAN COMMISSION CO.

ST. LOUIS, MO., *Nov.* 7, 1894.

Messrs. Gilchrist & Co., McGregor, Iowa.

GENTLEMEN: We have your favors of the 5th, and note contents. We also note your order to the Ossian agent to ship us two cars barley in place of the two cars burned, which is satisfactory.

Our barley market continues very dull, without any urgent demand for the present.

Please keep us advised of your offerings. We remain,

Yours truly, TEICHMAN COMMISSION CO.

McGREGOR, IOWA, *Nov.* 2, 1894.

Teichman Com. Co., St. Louis.

GENTLEMEN: We have your favor of first inst., and note same. We notified C., M. & St. Paul officials about the loss and will make claim at once, or as soon as we get all the papers—we will hurry affidavit of our Ossian agent tomorrow morning; we need the bills lading for the cars which you have.

Please send us at once—so can get our claim in promptly.

Better get balance of cars delivered before any more disasters. Chicago & Milwaukee are beating you on barley now; as soon as St. Louis will pay up, we will offer more.

Yours, GILCHRIST & CO.

314

McGREGOR, IOWA, *Nov.* 5, 1894.

Teichman Com. Co., St. Louis.

GENTLEMEN: Yours of the 3rd to hand with bills lading for two cars burned at East St. Louis.

We order our Ossian man to ship you the 2 cars to fill the sale in place of two cars burned.

Yours truly, GILCHRIST & CO.

We will likely send samples of other lots the latter part of week, if weather clears up so can clean it.

G. & CO.

Testimony of Jacob Rau.

JACOB RAU, being first duly sworn, testifies as follows:

Direct examination by Mr. HANSON:

Q. On the 10th day of October, 1894, did you ship from Wykoff, Minnesota, in St. Paul car # 46064, consigned to the Orthwein Grain Company, St. Louis, a car-load of barley?

A. Yes, sir.
Q. Did you also ship a car-load of barley from Wykoff, Minnesota, on the 16th of the same month, in St. Paul car # 43223, consigned to the Orthwein Grain Company, St. Louis?
A. Yes, sir.
Q. You may state, Mr. Rau, the facts concerning these two shipments; the arrangement under which they were shipped.
A. They were shipped to be sold there by the commission-house of Orthwein Grain Company.
Q. Was the Orthwein Grain Company, in the matter of this barley, acting as your agent to sell it?
A. Yes, sir.
Q. Had you made any sale of the barley to the Orthwein Grain Company?
A. No.
Q. State fully in your own way just the arrangement which existed between you and the Orthwein Grain Company in respect to these two cars of barley.
A. I shipped them cars to them, to be sold at the best price they could get for it.
Q. Now, in selling this barley for you, in what way did the Orthwein Grain Company act for you?
A. They charged me a commission.
Q. Did they act as your commission agents?
A. Yes.
315 Q. You had not made any sale whatever of this barley to them?
A. No.
Q. The Orthwein Grain Company never had sold these cars of barley for you, had they?
A. No, sir.
Q. They were destroyed by fire at East St. Louis as you understand?
A. Yes, sir.

Mr. WARREN: I object to his understanding.

Q. Are you the Mr. Rau, the Jacob Rau, named in this petition?
A. Yes, sir.
Q. Were you the owner of this barley at the time it was destroyed by fire at East St. Louis?
A. Yes, sir.
Q. Are you still the owner of the claim arising out of that destruction?
A. Yes, sir.
Q. No one else has any interest in the claim?
A. No, sir; no one.
Q. You are in business in Wykoff, Minnesota, are you?
A. Yes, sir.

Cross-examination by Mr. WARREN:

Q. How was this arrangement made, Mr. Rau, as to the selling of this barley between yourself and the Orthwein Grain Company?

A. I just sent the barley to them and let them sell it for what they could get for it.

Q. Was there any letters, any correspondence passed between you and them in regard to it?

A. Yes, sir.

Q. Have you that correspondence in your possession?

A. No, sir.

Q. Do you know where it is?

A. Yes, I know where it is, it is burned up. At one time last spring, in the store, them papers all burned up and most of my grain papers.

Q. You may state the substance of the correspondence which passed between you and the Orthwein Grain Company in reference to this sale?

A. Well, sir, after the cars got in, as far as I can remember, they wrote me that they had samples out of the cars, I guess on Saturday the car got in, and as far as I can remember, they took
316 samples out and wrote on Monday, that there was no market, I guess, on Saturday, and they didn't make sale of it, and that there was a fire the day before, or the night before, and they didn't know but the barley was burned up; that they would see and let me know, and in a few days afterwards I got notice that the barley was burned and I should send them the bill and they would collect it for me from the railroad company.

Q. Was there any correspondence passed between you previous to the shipment regarding it?

A. No; I generally sent to them when I had a car or two, and kept shipping to them right along. I had some sold to arrive but not these two cars.

Q. You did then sometimes make a sale to these people?

A. Yes.

Q. But in this case you simply forwarded the cars to them?

A. Yes, sir.

Q. Then did you advise them what you wanted done with them?

A. No, no advice.

Q. How did they know what you wanted done with those cars?

A. They know if I send them there I want them sold; they must know that when they got a commission-house. That was sent there to be sold.

Q. What arrangement as to commission did you have in regard to these two cars?

A. I didn't have no arrangement.

Q. I believe you stated that you were to pay them a commission?

A. Oh, yes; of course.

Q. What arrangement did you have?

A. The commission was two cents a bushel.

Q. When was that arrangement made?
A. That was the regular price; I don't know whether it was that at that time or not, because I got notice that they were only charging one cent. They wrote me that this barley would be worth 57 cents less freight in St. Louis.
Q. Before or after you shipped it?
A. After they had the sample taken out of the cars.
Q. I believe this barley was consigned direct to Orthwein & Company?
A. Yes, sir.
Q. Did you advise the common carrier that they were simply acting as your agents and that the barley was yours?
A. No, sir; I never did.
Q. Do you know whether or not the consignee Orthwein
317 & Company made any change in the destination of the barley after it has started along the line?
A. I don't think they did.
Q. I ask you if you know?
A. I never heard that it was changed; I suppose it always went the way it was billed by the owner.
Q. Did you select the route it should go on after leaving the road on which you shipped it, or did the consignee?
A. No, sir; I gave it to the Milwaukee road and had nothing to do with what route it went after it left their road.
Q. You did not instruct the Milwaukee road over what line to send it after it reached the end of their road?
A. No, sir.
Q. Do you know whether or not the consignee did?
A. No, I don't believe they did.
Q. Do you know about it?
A. Well, they had no right to change it after it was consigned to the Milwaukee road.
Q. You had consigned it to the Orthwein Grain Company?
A. Yes, sir.
Q. You don't know whether or not he changed the destination?
A. He never changed me any; never changed any of my bills of lading.
Q. Did you receive a bill of lading for these cars of barley?
A. No, sir; I did after it was burned; called for it then.
Q. Previous to that, you did not receive a bill of lading?
A. No; hardly ever.
Q. You simply advised the consignee by letter that you had shipped the car?
A. Yes, sir.
Q. Can you produce that letter or a letter-press copy of it?
A. No, sir; it was all burned up at that time.
Q. You may state the substance of that letter?
A. I have stated that; haven't I? What do you mean I should state?
Q. State what you wrote to the assignee?

A. I wrote car so and so, with such and such a number and the day and put it in the letter.

Q. You did not advise them what to do with it?

A. No, sir; they know their business when it goes there to sell it.

318 Redirect examination by Mr. HANSON:

Q. When the barley is received at St. Louis by the Orthwein Company, they sell it and account to you?

A. Yes, they give me credit and send me notice of the amount.

Recross-examination:

Q. Do you know whether or not of your own knowledge this barley was ever delivered to the consignees?

(Objected to because the pleadings show that it was destroyed, and the stipulation shows it was destroyed at East St. Louis.)

A. No; I don't know.

Testimony of J. H. Ellsworth.

Mr. J. H. ELLSWORTH being first duly sworn, testified as follows:

Direct examination by Mr. HANSON:

Q. You reside at McGregor?

A. Yes, sir.

Q. And are the president of the Huntting Elevator Company, one of the petitioners named in this proceeding?

A. Yes, sir.

Q. Did the Huntting Elevator Company make the following shipments of barley: September 24th from Prairie du Chien, St. Paul cars Nos. 11836 and 33090; October 13th from Lime Spring, Iowa, St. Paul car No. 34574; October 15th from Lime Spring, St. Paul car No. 32194; October 18th from Lime Springs, car No. 43080; October 12th from Prairie du Chien, St. Paul car Nos. 12; October 20 from the same place, St. Paul cars Nos. 178, 7286 and 16802 (in some places in this record appearing as No. 16502) and St. Paul car No. 46648, all consigned to the Teichman Commission Company, St. Louis, Missouri?

A. Yes, sir; they did.

Q. You may state, Mr. Ellsworth, the arangement, if any, under which these shipments of barley were made by the Huntting Elevator Company, to the Teichman Commission Company at St. Louis.

A. They were made to apply on ales which had been made to the Teichman Commission Company for barley to be delivered at St. Louis.

Q. What were the terms of the sale under which this barley
319 was shipped both with reference to prices, deliveries, payment of freights, etc.?

A. We sold it to be delivered at St. Louis; part of it at 56 cents per bushel and part at 54 cents. The Lime Spring barley we de-

livered at 56 cents a bushel, five thousand bushels; the Huntting Elevator Company was to pay the freight. In other words it was a sale of barley to net us these prices in St. Louis.

Q. The barley was all to be delivered at St. Louis?

A. Yes, sir.

Q. Who owned this barley at the time it was destroyed by fire?

A. The Huntting Elevator Company.

Q. Any other firm, person or corporation have any interest in it?

A. None whatever.

Q. What, if anything, was afterwards done toward filling this contract for the sale of certain quantities of barley——

(Objected to.)

Question continued: In place of these cars of barley which were destroyed at East St. Louis?

A. We shipped other barley to fill the sale.

Q. Why was this done?

A. We had made a sale of a certain amount of barley deliverable at St. Louis; the barley was not delivered and we supplied the deficiency.

Q. And so this subsequent shipment was made in pursuance of a contract which you had with the Teichman Commission Company to deliver to them at St. Louis a certain quantity of barley at certain prices?

A. Yes, sir.

Q. And these subsequent shipments were made necessary by the destruction by fire of the barley in these cars which I have named in my first question?

A. Yes, sir.

Q. Who was the owner of the claim arising out of the destruction of this barley?

A. The Huntting Elevator Company.

Q. Has any person, firm or corporation any interest in this claim?

A. No, sir.

Cross-examination:

Q. Were the terms of this sale made known to you and by you to the consignee?

A. I presume it was made known to us; generally our sales were made by telegram—acceptances by wire and confirmed by mail.

320 Q. Who made the offer to buy in these cases?

A. I could not say positively whether we made it or they; sometimes they made an offer and we would accept, and sometimes we offered them and they would accept.

Q. In each one of these cases those offers and acceptances were made by mail or wire, or both—is that a fact?

A. They were made by wire, that is the acceptances, and confirmed by correspondence.

Q. Have you all the correspondence which relates to the sale of these various shipments in your possession?

A. The sales were made in round lots and these shipments apply on those lots; we have the letters showing the sales were confirmed, the three different sales on which this barley applied.

By Mr. HANSON: These ten cars of barley were shipped to apply on sales of three different kinds?

A. Yes, sir; three different prices.

Q. Three prices, the barley to be delivered at St. Louis?

Q. Yes, sir.

Mr. WARREN: Are these three letters which you received from the consignee in reply to your offers of sale?

A. Yes, sir.

Q. Are they in the condition in which you received them?

A. The same.

Q. Has there been any alterations or additions made to them?

A. Not to my knowledge.

Q. I will call your attention to the letter dated September 15, 1894, which has the words "to be shipped to us here via East St. Louis" underscored.

A. Oh, that is simply my notation to it; I underscored it in lead pencil to call attention to it sooner; that is all; I made the pencil notation marks.

Q. There were none on there when you received the letter?

A. No, sir; not to my knowledge.

(Counsel for defendant- objects to the witness' testimony-in-chief relating to the contents of telegrams and letters which passed between them in regard to these three sales.)

Q. The letter dated October 10, 1894, contains these words: "We have your favor of the 8th inst. and note contents." I will ask you if you have a letter-press copy of that letter?

—. I presume we have; we copy everything that goes out of the office; I haven't it with me.

Q. I will ask you to produce it and make it a part of your evidence; I also wish to ask the witness to produce the telegrams, or copy-s of them, and of all other correspondence which passed between them in relation to these sales.

321 (The witnesses whose depositions are now being taken here state that they will use their best endeavors to find all the correspondence, letters and telegrams which passed between the petitioners and the commission-houses of Teichman Commission Company and the Orthwein Grain Company, and whatever letters or telegrams they are able to find they will send to the notary for identification and filing with their testimony. The witness, Mr. Rau, states that all his correspondence has been destroyed by fire which destroyed the building in which they were).

Q. Mr. Ellsworth, do you know of your own knowledge whether or not this barley was delivered to the consignee?

A. No, sir.

Q. Did you give the common carrier notice that the barley was yours until it reached St. Louis?

A. No, sir.

Q. Do you know of your own knowledge whether or not the consignee changed the destination of the barley?

A. I do not.

Q. Do you know of your own knowledge whether or not the consignee ever accepted the barley?

A. I do not.

Q. Do you know where the consignee was in the habit of receiving barley shipments made by you to him?

A. Where, did you say?

Q. Yes.

(Counsel for petitioners objects on the ground that it is entirely incompetent and immaterial as to what the habit was. The testimony shows that this barley was all sent to St. Louis, and it is immaterial as to what the habit of the consignee was in respect to it.)

A. I do not know, unless at St. Louis.

Q. You do not know of your own knowledge?

A. No, sir.

Mr. HANSON: I think you misunderstood one of Mr. Warren's questions as to whether these ten car-loads of barley had ever been accepted by the commission-house; you know it never had, and that other barley was shipped to take its place. You know that the barley had never been accepted by the commission-house?

A. Yes, sir.

By Mr. WARREN: Do you know of your own knowledge, or did they simply tell you that it had not been delivered?

A. We shipped other barley to take its place.

Last question repeated.

A. They notified us that the barley had not been delivered; that it had been burned.

322 Q. Then you do not know of your own knowledge?

A. No, sir.

Question by Mr. HANSON: Mr. Ellsworth you were asked whether when you delivered this barley to the railroad company, you notified the railroad company who owned it, whether you owned it or the consignees owned it, and you stated that you did not. Is that ever done, or is it customary for shippers to notify the railway company who owns the property?

A. Not to my knowledge.

Q. Or the terms under which it is sold?

A. Not to my knowledge; we have never done so.

Q. When you deliver barley to the St. Paul Railway Company you do not notify them of the terms under which you are shipping it?

A. No, sir.

Q. Mr. Ellsworth, what was the understanding between the Huntting Elevator Company and the Teichman Commission Company

in reference to the ownership of this barley that you have testified to?

A. The understanding was that we had sold them so much barley at a stipulated price, to be delivered at St. Louis.

Q. Freight paid?

A. Freight paid, and in the case of the barley shipped from Prairie du Chien the freight was prepaid; I paid the freight.

Q. Was that understanding acted upon in making these shipments of barley, that you were the owner of the barley until it was delivered at St. Louis?

A. So far as we were concerned.

Q. Has the Teichman Commission Company ever made any claim for this barley or ever claimed any interest or ownership in it?

A. Not to my knowledge.

By Mr. WARREN: Mr. Ellsworth, you may state how this understanding was arrived at, whether by correspondence or verbally.

A. It was by correspondence, letters and telegrams.

Q. And you have stated that you will produce this correspondence?

A. I will if I can.

(The following correspondence is attached to and made a part of the evidence of Mr. J. H. Ellsworth, pursuant to his statement that he will use his best endeavors to find all the correspondence which passed between his company and the Teichman Commission Company in relation to the sale of the barley referred to in his evidence.)

323 *Telegrams Relating to the Sale of Lime Spring Barley, 3 Cars of which were Burned.*

Received at McGregor, 10/10, 1894.
Dated St. Louis, Mo.

To Huntting Elevator Co.:

Do you accept fifty-five net five thousand McNally sample?

TEICHMAN COMMISSION CO.

Teichman Commission Co., Oct. 10, 1894.
St. Louis, Mo.

No, we cannot accept.

HUNTTING ELEVATOR CO.

Received at McGregor, 10/10, 1894.
Dated St. Louis, Mo.

To Huntting Elevator Co.:

Bid fifty-six net, leaving small margin shipment via East St. Louis.

TEICHMAN COMMISSION CO.

OCT. 10, 1894.

To Teichman Commission Co., St. Louis, Mo.:

Accept 56, five thousand Lime Spring barley.

HUNTTING ELEVATOR CO.

Letters and Telegrams Relating to the Replacement of the Ten Cars of Barley Destroyed.

ST. LOUIS, MO., *Oct.* 29, 1894.

Huntting Elevator Co., McGregor, Iowa.

GENTLEMEN: We have your favor of the 26th and note contents. Our barley market was more active today; however, prices obtained were rather slightly easier, at least we could not sell any of your barley at your limits.

Last night a fire in the yards of the J. & S. E. R. R. in E. St. Louis destroyed their freight warehouse and a great many cars of barley on adjoining tracks. We think likely some of your barley was amongst the cars destroyed; however, could not find out anything definite to-day. Will let you know as soon as we find out.

We remain, yours truly,

TEICHMAN COMMISSION CO.

324 Received at McGregor, 11/3, 1894.
Dated St. Louis, Mo.

To Huntting Elevator Co.:

All barley destroyed must be replaced, being held to contract.

TEICHMAN COMMISSION CO.

Nov. 3, 1894.

To Teichman Commission Co, St. Louis, Mo.

Will replace the barley. See letter.

HUNTTING ELEVATOR CO.

MCGREGOR, IOWA, *Nov.* 3, 1894.

Teichman Commission Co., St. Louis, Mo.

DEAR SIRS: We received a message from our agent at Lime Spring, this morning, which indicates that he had not the barley on hand, and would take until the 15th before he could get it, and as our competitors have put up the price of barley in that section of the country, we are quite in doubt whether we can buy so as to replace the three cars burned at the price sold for; so wires you "Barley not on hand, fill sale by 15th," and have your message this afternoon, saying all barley destroyed must be replaced, being held to contract. To which we answered would fill the sale. We will try to get this Lime Spring barley and ship by the 15th. We cannot promise it before, but the seven cars from Prairie du Chien will get off as soon as possible.

Yours truly,

(Signed) HUNTTING EL. CO.,
By J. H. ELLSWORTH, *Pres't.*

ST. LOUIS, MO., *Nov. 5th,* 1894.

Huntting Elevator Co., McGregor, Io.

GENTLEMEN: We have your favors of the 2nd and 3rd, and we are pleased to note that you will ship other barley in place of the cars lost in the late fire.

Our barley market is firm and unchanged in price, a better demand having developed.

Please keep us advised of your offerings, and oblige,

Yours truly, TEICHMAN COMMISSION CO.

325 *Lime Spring Barley.*

(Shipped to replace barley burned.)

We ship you today the following:

Car No.	Grain.	Grade.	Weight.	Date of shipment.
42698	Barley.....	Sample	40,000	11/14, 1894
31456	Barley.....	Sample	40,000	11/15, 1894
37596	Barley.....	Sample	40,000	11/22, 1894

The above three cars were shipped to replace barley burned on track at East St. Louis.

HUNTTING ELEVATOR CO.,
By J. H. ELLSWORTH, *Pres't.*

PRAIRIE DU CHIEN, WIS., *Feb.* 6, 1895.

This is to certify that I, J. P. Barnum, superintendent of elevator at Prairie du Chien, Wisconsin, for Huntting Elevator Company, caused to be loaded the cars given below, with amounts and grades of barley, and consigned to Teichman Commission Company, St. Louis, Mo., on dates as follows, to replace seven cars burned on track at East St. Louis, Ills.

Nov. 9, 1894.	Car C., M. & St. P.	#21036	Wt. 40,000	Grade 3
Nov. 9, 1894.	Car C., M. & St. P.	#34988	Wt. 35,100	Grade 3
Nov. 9, 1894.	Car C., M. & St. P.	#46972	Wt. 41,900	Grade 2
Nov. 9, 1894.	Car C., M. & St. P.	#37072	Wt. 31,400	Grade 2
Nov. 12, 1894.	Car C., M. & St. P.	#32512	Wt. 43,250	Grade 3
Nov. 16, 1894.	Car C., M. & St. P.	#46414	Wt. 55,600	Grade 3

Respectfully submitted.

J. P. BARNUM, *Sup't.*

Letters and Telegrams Relating to the Sale of Two Lots of Barley from Prairie du Chien, Seven Cars of which were Burned.

Received at McGregor, 9, 13, 1894.
Dated St. Louis, Mo.

To Huntting Ele. Co.:

Offered 56 net ten thousand No. 2. Wire answer.

TEICHMAN COMMISSION CO.

Received at McGregor, 9/15, 1894.
Dated St. Louis, Mo.

To Huntting Elevator Co.:
Impossible to improve on our bid of yesterday.
TEICHMAN COMMISSION CO.

McGregor, Ia., *Sept.* 15, 1894.

326

Teichman Commission Co., St. Louis, Mo.

Dear Sirs: Your telegrams received saying it is impossible to improve of your bid. We wired acceptance on 25,000 of our No. 2 sample barley. Please send us directions at once, as we must get it out.

We have yours of the 14th. If you can get good stiff prices on our No. 2 samples, we will give you the sole handling of it, but hope to get more than 56 net for the next lot. Think we can do better than that in Cincinnati.

Yours truly,
(Signed) HUNTTING EL. CO.

Sept. 15, 1894.

To Teichman Commission Co., St. Louis, Mo.:
Accept 56 net twenty-five thousand sample 2.
HUNTTING ELEVATOR CO.

St. Louis, Mo., *Sept. 15th*, 1894.

Huntting Elevator Co., McGregor, Iowa.

Gentlemen: We have your telegram accepting our bid of 56c. net for 25,000 bushels sample barley, to be shipped to us here via East St. Louis.

Our barley market not having opened yet fairly owing to the absence of brewers, our object in taking this lot of barley was simply to be prepared selling whenever our brewers enter the market, and we hope you will give us the control in this market of your barley. Also please wire us on receipt lowest price for a round lot of your sample #3 barley, at same time express us a bushel for a sample. We remain,

Yours truly,
—— ——.

McGregor, Iowa, *Sept. 20th*, 1894.

Teichman Commission Co., St. Louis, Mo.

Dear Sirs: We have yours of the 19th; please wire us best offer on 10,000 or 20,000 of our No. 3 sample barley delivered St. Louis.

Yours truly,
(Signed) HUNTTING EL. CO.

Copy.

Received at McGregor, 10/1, 1894.
Dated St. Louis, Mo.

To Huntting Ele. Co.:
Sold twenty thousand No. 3 fifty-four net via East St. Louis.
TEICHMAN COMMISSION CO.

327 McGREGOR, IOWA, *Oct.* 1, 1894.

Teichman Commission Co., St. Louis, Mo.

DEAR SIRS: We have your telegram saying sold 20,000 of our No. 3 at 54c. net via East St. Louis, and we consider it a good sale. When you can get 54 for 10,000 or 20,000 more please wire us, as we are thoroughly sold up on all barley we have on hand.

Yours truly,

(Signed) HUNTTING ELEVATOR CO.

ST. LOUIS, MO, *Oct.* 1, 1894.

Huntting Elevator Co., McGregor, Iowa.

GENTLEMEN: We wired you sale today of 20,000 bus. your #3 barley at 54c. net here, to be shipped via East St. Louis.

We have but a small margin left us on this sale, but we did not like our neighbors to head us off. Ship 10,000 bus. of this barley at once in large cars, and the balance let follow about the middle of this month or later.

Yours truly, TEICHMAN COMMISSION CO.

Testimony of Henry Rippe.

Mr. HENRY RIPPE, being first duly sworn, testified as follows:

Direct examination by Mr. HANSON:

Q. You live at Fairmount, Minnesota?

A. Yes, sir.

Q. Are you the Henry Rippe the petitioner herein?

A. Yes, sir.

Q. On the 8th of October, 1894, did you ship a car-load of barley in St. Paul, car No. 12611, consigned to the Orthwein Grain Company, St. Louis?

A. Yes, sir.

Q. On October 9th, 1894, did you ship another car of barley in St. Paul, car No. 3433, consigned to the "Orthwein Grain Company," St. Louis?

A. Yes, sir.

Q. You may state the arrangement under which these two cars of barley were shipped to the Orthwein Grain Company.

A. Well, the Orthwein Grain Company is a commission-house and we shipped them to sell for us on commission.

Q. Had you made a sale of this barley to the Orthwein Grain Company, or was it shipped to them to sell for you as agents?

A. They were to sell it as my agents, or for me.

Q. So they acted as your agents?

328 A. Yes, sir.

Q. Were you the owner of this barley at the time it was destroyed?

A. Yes, sir.

Q. Are you still the owner of the claim arising out of its loss by fire?

A. I am.

Q. Is any other person interested in any manner in it?
A. No, sir.

Cross-examination by Mr. WARREN:

Q. Have you any correspondence, Mr. Rippe, relating to this matter?
A. Yes, sir.
Q. Have you it with you?
A. I have all of theirs, but only one of my own letters.
Q. I will ask you to produce all the correspondence which relates to these two cars and make it a part of your evidence. Did you notify the railroad company that this barley was yours?
A. I had the commission-house do that.
Q. At the time you made the shipment, did you notify the railroad company that it was your barley, and not that of the consignee?
A. We always shipped in our own name; I consigned it to the Orthwein Grain Company, but I was the shipper.
Q. Did you notify the railroad company that the Orthwein Grain Company was simply acting as your agent when you shipped the barley?
A. I don't think that was really necessary; we tell the railroad company we want to ship to St. Louis, and they set us in cars, and then we load them and take the receipt for the same.
Q. Then you did not notify them that it was your barley, and that the consignee was simply acting as your agent in receiving the same?
A. I don't hardly get on to that some way; we never do.
Q. Did you or did you not do it in these two cases?
A. We shipped these the same as all our cars—no difference.
Q. Did you know whether or not the consignee made any change in the destination of the cars?

(Counsel for petitioners objects on the ground that it is not proper cross-examination, and not a proper subject for examination under the order under which this testimony is taken.)

A. They did not to my knowledge.

329 Redirect examination:

Q. You never notify the railroad company when you deliver shipments of barley or other grains, whether you own it or some one else owns it, do you?
A. No, sir.
Q. These letters which you have referred to in your testimony, not one of them except the typewritten letter signed Henry Rippe, dated 10-11-'94, relate to the two cars of barley in question, do they?

(Counsel for defendant- object to the witness stating the contents of the letters here present.)

A. No, sir.

Q. They relate entirely to the mode of doing business between you and the Orthwein Grain Company?
A. Yes, sir.

(The witness now offers the letters referred to, to the opposing counsel for him to use in evidence so far as they bear upon the manner in which the Orthwein Grain Company did the witness' business at St. Louis, but not as relating to the two cars in question.)

Recross-examination:

Q. You may state whether or not, Mr. Rippe, these two cars were shipped in pursuance to some definite order or instruction or request, or whether or not they were shipped in pursuance to the general custom of doing business between you and the consignee?
A. They were shipped in accordance with the general custom of doing business with the consignee.)

Redirect examination:

Q. What was that general custom?

(Counsel for defendant- objects to the witness stating the general custom if the letters show the general custom under which the Orthwein Company acted for him at St. Louis.)

Q. Did he act as your agent?
A. I send the barley to him and he sells the barley and then returns me the money; very often we draw on him, so he is just the agent; he didn't buy it out and out.
Q. You simply send it to him for sale?
A. Yes, sir.
Q. And when he has sold it he accounts to you?
A. Yes, sir.
330 Q. And he has never accounted to you for these two cars?
A. No, sir.
Q. And you are still the owner of the claim?
A. Yes, sir.

Recross-examination:

Q. I hand you this letter dated October 26, 1894, and ask you whether or not that states the general custom of your agent in St. Louis, in handling of shipments made by you to him.

(Counsel for petitioners objects to the letter for the reason that it relates to other matters than the matters which can be testified to under the order of the court by which this testimony is taken; that is, I object to so much of that letter which relates to matters not within the order of the court under which this testimony is taken.)

Mr. WARREN: I wish to say that the witness is attempting to testify in regard to the general custom existing between himself and his agent in St. Louis as to the manner of their doing business,

which general custom the witness has heretofore testified is set out in a number of letters of which this is one.

WITNESS: This is the only letter I have got from them which reads just like that, but I don't know whether that is their general custom or not.

Q. Do you know the signature of your agent at St. Louis?

A. Yes, sir.

Q. Is that the signature of your agent attached to that letter?

A. Yes, sir.

(Counsel for defendant- requests the witness to produce the letter and make it a part of his evidence.)

Redirect examination:

Q. Mr. Rippe, after you delivered these cars of barley, or any carload of barley to the St. Paul Railway Company, which cars were consigned to the Orthwein Grain Company at St. Louis, did you afterwards give any orders to anybody for holding that barley or making any disposition of it?

A. No, sir.

Q. If the barley was held at any place it was done without any order from you was it?

A. Yes, sir.

Q. And without any knowledge on your part?

A. Yes, sir.

Q. Is this letter of October 26, 1894, the first and only letter of the kind which you ever received from the Orthwein Grain
331 Company, in which they tell you that after the barley comes to East St. Louis, it is held there until disposition is given to the railroad company at East St. Louis, and the road pays the transfer?

A. Yes, that is the first time I knew anything about it.

Q. Did you have anything to do with holding the property there?

A. No, the barley was slow going in and I wrote them about it. Yes that is the first letter I had of that kind, and I presume it was because I wrote them that the cars were slow going in.

Q. But you didn't know why?

A. I didn't know why, and that was why I wrote, and that must be their reply to me.

Q. You had nothing to do with their being slow?

A. That is the reason I wrote them; if I had had, I should have hustled them along faster.

Recross-examination:

Q. Upon receipt of this letter did you instruct your agent not to allow the shipments to be held in East St. Louis?

A. I do not think I did.

Q. What did you do upon receipt of the notice contained in this letter, to wit: "All your shipments come via J. S. E. R'r'd into East St. Louis, and are held there until disposition is given them, and they pay the transfer," in regard to instructing your agent?

A. I don't think I wrote them anything; I left it to their mode of doing business; I could not tell them what to do down there.
Q. You allowed them to handle that end of the business?
A. Yes, sir.

(The witness now offers in evidence letters from William D. Orthwein Grain Company to Henry Rippe, under date of September 19, 1894, October 10, October 15, October 20 and October 23, 1894, and letter from Henry Rippe to William D. Orthwein Grain Company, dated 10/11/94/, for the purpose of showing the manner in which the Orthwein Grain Company acted as agent for Henry Rippe in the handling and disposition of the barley which was shipped by Henry Rippe to the Orthwein Grain Company.)

Letters received in evidence and marked respectively "Rippe Exhibit- A, B, C, D, E, F," and hereto attached.

Mr. WARREN: Let the record show that this witness is sworn for the receiver, and I now offer this witness as my witness, and in connection with this matter I offer the letter dated October 26, 1894, addressed to the witness, signed by the Orthwein Grain Com-
332 pany. I offer the letter in evidence as one of a number received by him showing the custom of transacting business between himself and his agent.

Mr. HANSON: I object to so much of this letter which reads as follows: "All your shipments come via J. S. E. R'r'd into East St. Louis, and are held there until disposition is given them and they pay transfer," for the reason that that portion of the letter is not within the order of the court under which this testimony is taken.

Letter received in evidence marked "Rippe—Exhibit G," and hereto attached.

RIPPE EXHIBIT "A."

ST. LOUIS, MO., *Sept.* 19, 1894.

Henry Rippe, Esq., Fairmount, Minn.

DEAR SIR: We today sold your car #20002 B/barley at 57c. tracks this side, and trust the sale will be satisfactory. The weather is now cool, and we think the season far enough advanced that there will be no doubt our maltsters will be able to continue operations from now on, this insuring a market for all offerings. If above value is satisfactory we would recommend free shipments. Expect some of your other cars tomorrow.

Yours truly,

WM. D. ORTHWEIN GRAIN COMPANY.

RIPPE EXHIBIT "B."

ST. LOUIS, MO., *Oct. 10th*, 1894.

Henry Rippe, Esq., Fairmount, Minn.

DEAR SIR: Yours of the 8th inst. advising shipment of car barley at hand.

Wired you whether to sell five cars more at 56c., and have your

answer to do so. We have no sample left, and will have to await arrival of above car before we can do anything.

Yours truly,

WM. D. ORTHWEIN GRAIN COMPANY.
W. E. ORTHWEIN, *Secretary.*

RIPPE EXHIBIT "C."

ST. LOUIS, MO., *Oct. 15th*, 1894.

Henry Rippe, Esq., Fairmount, Minn.

DEAR SIR: Your favor of the 12th inst. to hand and note contents.

333 Will sell your barley on arrival best we can. Your car No. 609 has been here for several days, but as we could not get over 55c. for it, we have not sold it.

Market weak and tending lower.

Yours truly,

W. E. ORTHWEIN, *Secretary.*

RIPPE EXHIBIT "D."

ST. LOUIS, MO., *Oct. 20th*, 1894.

Henry Rippe, Esq., Fairmount, Minn.

DEAR SIR: Your favor of the 18th inst., as well as sample barley, to hand today.

We could not get a bid to arrive, as there was only one buyer on 'change, and he bought nothing but spot barley.

Hope to be able to wire you a bid on Monday, although all of our buyers are holding off looking for lower price.

Yours truly,

WM. D. ORTHWEIN GRAIN COMPANY.
W. E. ORTHWEIN, *Secretary.*

RIPPE EXHIBIT "E."

ST. LOUIS, MO., *Oct.* 23, 1894.

Henry Rippe, Esq., Fairmount, Minn.

DEAR SIR: Today we succeeded in getting a bid of 55c. for five cars of your barley which we accepted, considering it a very good bid in our present market.

Will deliver same out of barley already shipped, provided same is up to sample sold by. The party to whom we still owe 3 cars on 1st sale at 56c. gave us notice a few days ago that he would not take it any more, the barley being out too long.

We, of course, will try our best to get him to take it when barley arrives, but should he absolutely refuse, will deliver same on today's sale, in which case there are still 2 cars unsold of what you have already shipped.

Market still dull and dragging.

Yours truly,

WM. D. ORTHWEIN GRAIN COMPANY.

RIPPE EXHIBIT "F."

10/11/94.

Wm. D. Orthwein Grain Co., St. Louis, Mo.

GENTLEMEN: Ship your car 3433 barley from Grand Meadow. This is a nice choice car of barley, and better than the cars
334 sold to arrive. If any of my cars arrives and you can get a premium on them over what they sold at, wish you would do so, and will replace them by further shipments.

Yours truly, HENRY RIPPE.

RIPPE EXHIBIT "G."

ST. LOUIS, Mo., *Oct.* 26, 1894.

H. Rippe, Esq., Fairmount, Minn.

DEAR SIR: Yours of the 24th to hand, with letter from your agent, which we herewith return. All your shipments come via J. S. E. R'r'd into East St. Louis, and are held there until disposition is given them and they pay transfer.

Two of your cars, #11722 and #6320, arrived this afternoon, and expect the others will soon follow.

Barley market quiet; nothing new to report.

Yours truly,

WM. D. ORTHWEIN GRAIN COMPANY.

Testimony of S. Y. Hyde.

Mr. S. Y. HYDE, being first duly sworn, testified as follows:

Direct examination:

Q. You reside at La Crosse, Wisconsin, Mr. Hyde?

A. Yes, sir.

Q. You are the president of The S. Y. Hyde Elevator Company, the petitioner herein?

A. Yes, sir.

Q. On the 29th of September, 1894, did the S. Y. Hyde Elevator Company at Wykoff deliver to the St. Paul Railway Company a car of barley in St. Paul cars #680, consigned to the Teichman Commission Company, St. Louis, Missouri?

A. That is according to the records.

Q. On the 16th day of October did the S. Y. Hyde Elevator Company, at La Crosse, deliver to the St. Paul Company barley in cars, as follows: C., B. & Q. cars, Nos. 10814, 11962, 14385 and 1919, and one other car belonging to the St. Louis, Belleville & Southern Illinois Railway Company, No. 20975, consigned to the Teichman Commission Company, St. Louis, Missouri?

A. That is according to the records of the business.

Q. To whom did that barley belong?

A. It belonged to the Hyde Elevator Company.

335 Q. Under what arrangement was it sent to the Teichman Commission Company at St. Louis?
A. We sold it by sample to be delivered at St. Louis.
Q. St. Louis the place of delivery?
A. Yes, sir.
Q. At a certain price?
A. Yes, sir.
Q. What in reference to the payment of freight?
A. I think it went on transit account, freight paid.
Q. Who paid it?
A. We paid it.
Q. So this barley was to be sent to St. Louis at a certain price, delivered there, freight paid by the S. Y. Hyde Elevator Company?
A. Yes, sir.
Q. This barley, it is stipulated, was destroyed by a fire at East St. Louis on the night of October 28, 1894. Did the S. Y. Hyde Elevator Company subsequently ship other barley to take the place of this barley which was destroyed?

(Counsel for defendant objects to what occurred subsequent to the fire.)

A. Yes, sir.
Q. You may state what was done.
A. As to the shipment of other barley?
Q. Yes, sir.
A. We shipped other barley to take its place, and the same amount.
Q. Now, was this the first barley which was destroyed shipped to fill a certain quantity of barley to be delivered at a certain price?
A. Yes, sir.
Q. And the subsequent shipments were made to fill the quantity on account of the loss of this first shipment?
A. Yes, sir.
Q. At the same price?
A. Yes, sir.
Q. Had any other firm, person or corporation any interest in this barley other than the S. Y. Hyde Elevator Company?
A. No, sir.
Q. Who owns the claim arising out of the loss of this barley?
A. The Hyde Elevator Company.
Q. Has any other person, firm or corporation any interest in the claim?
A. Not the slightest.

336 Cross-examination:

Q. This barley was shipped pursuant to a bargain and sale?
A. Yes, sir.
Q. How was this bargain and sale made?
A. It was by correspondence.
Q. Have you the correspondence in relation to it?
A. I suppose I have, but the man who has kept charge of those

matters is out of town and I do not know whether I can dig them out or not. He will be back day after tomorrow.

(Objection is interposed by counsel for defendant- to the witness' direct examination on the question of the contents of the correspondence relating to the bargain and sale of the barley.)

Mr. HANSON: He has not testified to the contents of any of them.

Q. Was the grain which you delivered to the common carrier up to the sample which you sent to the consignee?

A. I suppose it was; it had not reached them and I do not know. We shipped it to be up to sample; we make it up to sample; that is the idea.

Q. You made it up to sample and shipped it to them?

A. Yes, sir.

Q. Do you know, of your own knowledge, whether or not it was ever delivered to the consignee?

A. We understand it was burned.

Q. I speak of your own knowledge in reference to the matter.

A. No, sir.

Q. Did you notify the railroad company when you delivered the grain to them that you were the owner of it?

A. No, sir.

Q. Do you know whether or *or* not the consignee made any change in the destination?

A. No, sir; I do not.

Q. Will you produce all the correspondence which relates to the bargain and sale of this barley and make it a portion of your evidence?

A. I will if I can find it.

Redirect examination:

Q. You have had a great deal of experience in shipping grain, have you not, Mr. Hyde?

A. Yes, sir.

Q. Is it customary among shippers to notify the railroad
337 company, when grain is delivered to it, of the arrangement under which the shipment is made?

A. No, sir; it is not; it has never been the custom with us.

(The witness states that he will make diligent search for all telegrams and letters in regard to the sale of this barley, and if he finds them will produce them to the notary, to be made a part of his evidence in this matter.)

Q. Mr. Hyde, what was the understanding between the S. V. Hyde Elevator Company and the Teichman Commission Company in respect to the ownership of this barley?

A. The understanding was, so far as our company was concerned, that we owned the barley until it was delivered and accepted on the sale in St. Louis.

Q. Was that understanding acted upon between you and the

Teichman Commission Company that the Hyde Elevator Company was the owner of the property?

A. It was, so far as we were concerned, and they did not pay us for the barley until it arrived and was accepted.

Q. And this barley never having arrived you shipped other barley to fill its place?

A. Yes, sir.

By Mr. WARREN: Mr. Hyde, you may state how this understanding was arrived at between your company and the Teichman Commission Company, whether verbally or by correspondence?

Q. And I believe that you have stated that you will produce that correspondence?

A. Yes, sir; I will endeavor to do so.

Statement Made by Mr. Hyde.

Since giving my testimony I have examined our office files thoroughly for letters and telegrams, and have been unable to find the correspondence between the S. Y. Hyde Elevator Company, and the Teichman Company, in reference to the sale of barley, on which account the six cars of barley were shipped to St. Louis. This correspondence is either mislaid or has been lost. A man by the name of E. Clarke, who was in the employ of the Hyde Elevator Company, at and prior to the time the barley was shipped, and who had charge of the correspondence, and of preparing the papers for this claim, and who has since this barley was destroyed been discharged by the Hyde Elevator Company, on the ground that he had been defrauding it, must have in some manner, unknown to the S. Y. Hyde Elevator Company, disposed of the correspondence relating to this claim. The book in which the telegrams relating to these barley shipments were kept is missing. All the other books,
338 both before and after, are in their place, but this particular book cannot be found in the office, and I do not know where it is, nor does any one else in my office. I will continue searching, and if I find it will produce the telegrams, and will also produce the letters if I can find any. I am almost certain that this man Clarke has taken this correspondence, for the reason that other papers are also missing, which I have every reason to believe he took; for instance, tax receipts covering our property along the line of the Southern Minnesota division of the Chicago, Milwaukee and St. Paul Railway Company are missing, and copies of letters relating to the same are gone.

The contents of the telegrams and letters as near as I can now recollect, is that the telegram containing the offer to sell the barley stated that we offer you so many bushels of barley, (naming the amount) at such a price, (naming it) to be delivered at St. Louis; that the Teichman Commission Company replied to this telegram, either by wire or by letter, and perhaps by both, accepting the offer, and the barley was shipped. The only other letter relating to the matter which I recollect of, was a letter from the S. Y. Hyde Ele-

vator Company, to the Teichman Company, asking for the number of the cars of barley which were destroyed by fire at East St. Louis, and saying that we would ship other barley in place of that destroyed. We were afterwards furnished with the number of the cars which were destroyed, and other barley was shipped to the Teichman Commission Company to take the place of the barley which never reached St. Louis, or was destroyed by fire at East St. Louis, as we were advised. This is in substance what was contained in the letters and telegrams as near as I can recollect it.

Testimony of W. W. Cargill.

Mr. W. W. CARGILL, being first duly sworn, testified as follows:

Direct examination:

Q. You reside at La Crosse, Wisconsin?
A. I do.
Q. Are you the president of the W. W. Cargill Company?
A. I am.
Q. A corporation of Wisconsin, is it?
A. Yes.
Q. The W. W. Cargill Company is one of the petitioners named in these proceedings?
A. It is.

339 Q. On the 12th day of October, 1894, did the W. W. Cargill Company ship two car-loads of barley from La Crosse in St. Paul cars Nos. 32986 and 20022?
A. Yes, sir.
Q. Consigned to the Teichman Company, St. Louis?
A. Yes, sir.
Q. On the 18th of October of the same year did it ship one other car-load of barley in St. Paul, car No. 1100, consigned to the same company?
A. Yes, sir.
Q. And on the 20th of the same October another car in St. Paul, car No. 15254, consigned to the Teichman Commission Company, St. Louis?
A. It did.
Q. Who was the owner of these car-loads of barley?
A. W. W. Cargill Company.
Q. Under what arrangement were these cars of barley shipped by the W. W. Cargill Company to the Teichman Commission Company at St. Louis?
A. They were shipped on a sale made in September, two cars, 52986 and 20022, sold at 53½ cents, net. Cars 1100 and 15254 sold at 55½ cents, net. This barley was sold by sample, and the cars graded and loaded to that sample and shipped to the Teichman Commission Company at St. Louis to be delivered, two sales.
Q. To be delivered where?
A. At St. Louis.

Q. Who paid the freight under this arrangement, the Cargill Company or the Teichman Commission Company?

A. The Cargill Company.

Q. Were these cars shipped in pursuance of any agreement or arrangement by which a certain quantity of barley was to be delivered at St. Louis, at a certain price, freight prepaid?

A. They were.

Q. That was the arrangement, was it?

A. Yes, sir.

Q. That a certain quantity of barley at a certain price was to be delivered at St. Louis, freight paid, by the W. W. Cargill Company?

A. Yes, sir.

Q. Now, it appears, Mr. Cargill, that the barley in these cars was destroyed at East St. Louis by fire on the 28th of October, 1894. Now, what, if anything, did the W. W. Cargill Company subsequently do in reference to replacing this barley which was destroyed?

(Counsel for defendant objects to what occurred subsequent
340 to the fire.)

A. We shipped an equal amount of barley that was burned to fill these sales.

Q. Now why was that?

A. Because he had sold 10,000 bushels of this grade of barley at a certain price, delivered at St. Louis. These four cars failed to arrive at St. Louis, and we were compelled to ship the same amount, the same grade, to fill the sale.

Q. That is why this subsequent shipment was made?

A. Yes, sir. Car No. 15254 was damaged and sold by the Teichman Commission Company I understand, on account of the railroad company; we declined at first to take the proceeds $289.81, but later decided to take it on account, and we were credited in the claim with $289.81.

Q. You mean the receiver of the Chicago, Peoria & St. Louis Railroad Company credited you with this amount?

A. Yes, sir.

Q. Has there any other person, firm or corporation any interest or ownership in this barley than the W. W. Cargill Company?

A. No other.

Q. Who owns the claim arising out of the destruction of this barley?

A. The W. W. Cargill Company.

Q. Any other firm, person or corporation any interest in it?

A. None whatever.

Cross-examination:

Q. Was this shipment made in pursuance to a bargain and sale?

A. It was.

Q. How was this bargain made, verbally, or by written instructions?

A. Telegrams.

Q. Have you the correspondence?
A. Not complete.
Q. Do you know where it is?
A. Part of it, here is one letter (handing letter to counsel).
Q. You say there was other correspondence beside the letter dated September 28th, 1894, addressed to and signed by the Teichman Commission Company, which passed between you relating to this sale?

A. Well, I don't know; I guess that covers about all.

341 Q. That letter covers all the correspondence, covers the whole bargain both verbal and written in regard to this sale?

A. Yes, sir.
Q. I will ask you to produce that letter and make it a part of your evidence.
By Mr. HANSON: This letter shows that it is not all.
WITNESS: He does not ask for mine, does he?
Mr. WARREN: I ask you to produce that letter from Teichman Commission Company to you; is there any correspondence from you to the Teichman Commission Company?
A. Yes, sir.
Q. I will ask you if you have that, or a copy of it, in your possession.
A. I have got it in the office.
Q. I will ask you to produce it and make it a part of your evidence. You may state whether or not you notified the railroad company, at the time of shipment, that you were the owner of this barley.
A. No, sir.
Q. You may state whether or not you know of your own knowledge whether this barley was delivered to the consignee.
A. Of my own knowledge?
Q. Yes.
A. I suppose that would have to be eyesight. No, I do not know of my own knowledge. I do not know anything about it of my own knowledge.
Q. Do you know of your own knowledge whether the consignee ever changed the destination of this barley?
A. No.

Redirect examination:

Q. He had no right to change it, or interfere with it, had he?
A. None whatever.

(Counsel for defendant objects to the last question as being one of law and not of fact.)

Q. Did you ever in any manner authorize the consignee to change the destination of this barley?
A. I did not.
Q. Or interfere with it in any way?
A. No way whatever.

Q. You shipped it consigned to St. Louis, to be delivered there?
A. Yes.
Q. And you never authorized or knew of anybody changing the destination of it, or the disposition of it?
342 A. No.

(Counsel for defendant objects to the evidence of the witness in relation to the bargain and sale, inasmuch as he has testified that it was made through correspondence, and that he has the correspondence in his possession and expects to produce it.)

The witness states that he will make diligent search for all telegrams and letters in regard to the sale of this barley, and if he finds them he will produce them to the notary, to be made a part of this, his evidence.

By Mr. HANSON: Mr. Cargill, what was the understanding between the W. W. Cargill Company and the Teichman Commission Company in respect to the ownership of this barley?
A. So far as I know, that we were the owners of the barley until it was accepted on the sale at St. Louis.
Q. That was the understanding acted upon afterwards by both parties, after the barley was burned, in replacing it with other barley?
A. It was.
Q. In what way?
A. By the shipment of the barley.
By Mr. WARREN: Mr. Cargill, you may state how the understanding which you have testified to was arrived at.
A. It was a plain business affair; it is purchase and sale. If you buy a load of coal at your house it is not your coal until it gets in the cellar.
Q. Was this understanding arrived at by correspondence or verbally?
A. I don't know as it was either.
Q. I will ask you if you did not state that this bargain and sale of this particular barley was made pursuant to correspondence which occurred between yourself and the consignee.
A. Yes, but you are asking how this determination was arrived at.

Mr. WARREN: I object to the witness' opinion; I want him to testify to the facts.

(The following correspondence is attached to and made a part of the evidence of Mr. W. W. Cargill, pursuant to the statement of the witness above made, that he would make diligent search for all letters and telegrams which passed between his company and the Teichman Commission Company in relation to the sale of above barley:)

OCT. 31, 1894.

Teichman Commission Company, St. Louis, Mo.

GENTLEMEN: We understand the fire at St. Louis, Sunday,
343 has burned a great many cars of barley and possibly some of them may be ours, and we would like to have you give us

the numbers of the cars that are burned and belonging to us, and we will reship the number of cars billed to you. Would be pleased, too, if you would make an effort to find the car numbers and give them to us as quick as possible, so we can duplicate the shipment and fill the sale. Please reply as early as possible.

Yours truly, W. W. CARGILL COMPANY.

SEPT. 27TH, 1894.

Teichman Commission Company, St. Louis, Mo.:

Will sell ten A barley October, shipment fifty-five half (55½) net

W. W. CRAGILL CO.

LA CROSSE, WIS., *September* 28, '94.

Teichman Commission Company, St. Louis, Mo.

GENTLEMEN: We have your message accepting our offer of 55½ for A barley, October shipment. We hereby confirm same.

Receipts of barley not large, and farmers seem to be busy plowing, and rather a disposition not to sell.

Yours truly, W. W. CARGILL COMPANY.

ST. LOUIS, MO., *Sept.* 28, 1894.

W. W. Cargill Company, La Crosse, Wis.

GENTLEMEN: Late last evening we wired you acceptance of your offer to sell 10,000 bushels your "A" barley Oct. shipment at 55½c. net here, shipment to be made via East Louis.

Our market is unchanged, with a very light demand for barley. We remain,

Yours truly, TEICHMAN COMMISSION CO.

Testimony of William McMichael.

Mr. WILLIAM MCMICHAEL, being first duly sworn, testified as follows:

Direct examination by Mr. HANSON:

Q. Mr. McMichael, you live in McGregor, Iowa?

A. Yes, sir.

Q. And are one of the petitioners named herein?

A. Yes, sir.

344 Q. On the 16th of October, 1894, did you ship from McGregor, Iowa, four cars of barley in St. Paul cars No. 37506, 12336, 2598, and 4146 consigned to the Teichman Commission Company, St. Louis?

A. Yes, sir.

Q. On the 19th of the same October, did you ship from McGregor two other cars of barley in St. Paul cars Nos. 3728 and 18126, consigned to the Teichman Commission Company, St. Louis?

A. Yes, sir.

Q. And on the 22d day of October, of the same year, from the same place, two other car-loads of barley in St. Paul cars No. 10720

and 6842, consigned to the Teichman Commission Company, St. Louis?

A. Yes, sir.

Q. Who was the owner of this barley?

A. T. McMichael & Son.

Q. Under what arrangement was it shipped to the Teichman Commission Company, at St. Louis?

A. Under a sale of 15,000 bushels of barley made October 15th.

Q. At what price and other terms?

A. Sold at 58c. net at St. Louis.

Q. Where delivered?

A. At St. Louis, Missouri, less inspection and weighing.

Q. Who paid the freight?

A. T. McMichael & Son prepaid it from McGregor, Iowa, through to St. Louis, Mo.

Q. This barley was destroyed by fire at East St. Louis, October 28, 1894; what, if anything, did T. McMichael & Son do in respect to the destruction of the barley?

A. The destruction of the barley caused us to buy other barley to fulfill our contract.

(Counsel for defendant objects to evidence in reference to what was done subsequent to the fire.)

Q. What did you do with it, did you ship it?

A. We had some cars already on the road, and shipped some fresh cars after notice of the burning of the barley to fill the contract made October 15th for the 15,000 bushels.

Q. Was that subsequent to the fire that you shipped a like quantity of barley as that burned to fill the contract which you made on the 15th of October?

A. Yes, sir.

Q. Who owned this barley at the time it was destroyed?

A. T. McMichael & Son.

345 Q. Who owned the barley which was shipped to take the place of that destroyed?

A. T. McMichael and Son.

Q. And why did you ship that other barley to take the place of that destroyed?

A. To fulfill a contract which we made October 15th.

Q. To deliver a certain quantity of barley to the Teichman Commission Company at St. Louis?

A. At 58 cents net.

Q. Is T. McMichael and Son the owner of the claim arising out of the loss of this barley?

A. Yes, sir.

Q. Any other person, firm or corporation have any interest in it?

A. No, sir.

Cross-examination by Mr. WARREN:

Q. Was this shipment made in pursuance to a bargain and sale, Mr. McMichael?

A. Yes, sir.

Q. You may state whether that bargain and sale was made verbally or by written instrument?

A. It was made by written correspondence.

Q. I will ask you if you have this correspondence in your possession, or copies of it?

A. I have not the correspondence in my possession.

Q. Do you know where it is?

A. I think it is in our office at McGregor—supposed to be there; that is where it should be.

Q. Will you produce the correspondence, and make it a part of your evidence?

A. I will if I can find it.

Q. Have you any correspondence now, here present?

A. In reference to the sale and purchase?

Q. Yes.

A. No, sir; I have no correspondence.

Q. Did you notify the railway company when you shipped this barley that it was yours and did not belong to the consignee?

A. We did not notify the railway company, no, sir; it is understood that all our shipments are ours.

Q. Is that the understanding between you and the consignee?

A. It is with ourselves; we have no right to have any understanding with any one; it is a matter of fact that it is our property.

Q. Do you know, of your own knowledge, whether or not this barley was ever delivered to the consignee?

346 A. It was not delivered to the consignee, as a matter of fact, because we have not received our pay for the same.

Q. Do you know, of your own knowledge, whether or not this barley was ever delivered to the consignee?

A. It was not delivered.

Q. How do you know that?

A. Because Teichman & Company asked us, I presume, to refill it.

Q. Then your testimony is based on what some one else has told you about it?

A. On what I see and know; the fact of the matter is they said we did not deliver it in St. Louis.

Q. They said so?

A. I guess the facts bear them out.

Q. Do you know, of your own knowledge, whether or not the consignee ever changed the destination of this barley?

A. He did not, to my knowledge.

Redirect examination:

Q. You know that after this barley was shipped the consignee notified you that you never delivered the full amount of barley you agreed to deliver?

A. Yes, sir.

Q. And they asked that you make such delivery?

A. Yes, sir.

Q. And you accordingly made delivery of the amount contracted for, subsequently?

A. Yes, sir.

(Counsel for defendant objects to evidence concerning what was done subsequent to the fire.)

Q. And you did that because you were reliably informed that it had been burned up at East St. Louis?

A. Yes, sir.

By consent of the attorney for the receiver the testimony of this witness is also taken in respect to three other cars of barley mentioned and described in the petition of T. McMichael and Son, and all objections as to the time of taking such testimony *is* waived.

This consent and waiver is made for the reason that it appears that in entering into the stipulation of August 27, 1895, by mistake the three cars of barley hereinafter testified to were omitted on said stipulation.

By Mr. HANSON: Mr. McMichael, on the 6th day of October, at McGregor, Iowa, did you deliver a car of barley in St. Paul
347 car No. 36088, and on the 22d of the same October, at the same place, two other car-loads of barley in St. Paul, cars Nos. 4268 and 7552, to the St. Paul Company, consigned to Teichman Commission Company, St. Louis?

A. Yes, sir.

Q. Under what arrangement was this barley shipped to St. Louis to the Teichman Commission Company?

A. It was shipped to apply on a sale.

Q. Were these three cars shipped by you under the same arrangement as the cars above stated?

A. Yes, sir.

Q. To apply on the same contract?

A. Yes, sir.

Q. So the arrangement for the shipment of these three cars of barley was precisely the same as the above eight cars of barley, and to apply on the same contract?

A. Yes, sir.

Q. And shipped under the same contract?

A. Yes, sir.

Q. What was done in reference to these three cars after they got to East St. Louis? State briefly.

(It is stipulated by and between the counsel for the respective parties that the cross-examination of this witness on the eight cars of barley will also apply to the last three cars mentioned, so far as that cross-examination applies to the arrangements for the sale of the same from T. McMichael and Son to the Teichman Commission Company.)

A. Upon their arrival at East St. Louis the barley was damaged by fire, and it was taken in charge by one Calvert, the agent of the receiver, and put in charge of Teichman and Company to sell on

account of the receiver as damaged barley, and the net proceeds of that sale amounted to $877.10; had the barley not been damaged it would have sold for $1,123.78, making a net loss on the barley to T. McMichael and Son of $226.68, in which amount T. McMichael and Son were damaged on account of said loss by fire, and this amount should be added to the amount stated in the stipulation of August 27th, to wit: $2,942.56, making a total of $3,169.24 as the amount of the damage to T. McMichael and Son sustained by the destruction of the barley by fire at East St. Louis.

(The following correspondence is attached to and made a part of the evidence of Mr. William McMichael in this matter, pursuant to his statement above made that he would produce what correspondence he could find in relation to the bargain and sale of the barley referred to in his testimony.)

348 McGREGOR, IOWA, *Oct.* 15, 1894.

Teichman Commission Company, St. Louis, Mo.

GENTLEMEN: Your message received this p. m., as follows: "Sold 15,000 sample last cars shipped, 58c. net; answer."

We replied, "Accept 58 cents net 15,000 bushels including the five cars to apply, gold prices higher."

We do not feel anxious to sell barley to arrive at these prices, and if any higher offers for new sample "A" wire for our acceptance.

Barley in our territory about all out of the farmers' hands. We mean new sample "A" same as five-car sample.

Yours very truly, T. McMICHAEL & SON.

Nov. 2, 1894.

Received at McGregor.
Dated St. Louis, Mo.

To T. McMichael & Son:

Will you replace the burnt barley at once to fill sale.

TEICHMAN COMMISSON COMPANY.

ST. LOUIS, MO., *Oct. 30th*, 1894.

Messrs. T. McMichael & Son, McGregor, Iowa.

GENTLEMEN: We are as yet unable to give you car numbers of barley destroyed by fire as written yesterday, but we are convinced that several of your cars were in the lot of burned and damaged barley.

We would now suggest that you give notice to your railroad at your end to push the Jacksonville Southern line here, to adjust loss sustained as speedily as possible.

Our barley market, as you will observe, is rather tame, and buyers manifest no desire to take hold.

Yours truly, TEICHMAN COMMISSION CO.

ST. LOUIS, MO., *Nov.* 2, 1894.

Messrs. T. McMichael & Son, McGregor, Iowa.

GENTLEMEN: We are in receipt of your telegram saying that you will replace your barley lost by the late fire.

We now have the assurance of the receiver of the J., S. & E. R. R. that they are amply able and anxious to settle the loss of barley by fire, as speedily as possible, which, however, may be delayed by the question arising if the barley is covered by their insurance
349 policy or by the one held by the Terminal Railway Company, which will soon be determined, as that company is co-operating with the J. & S. E. R. R. to effect an adjustment. We remain,

Yours truly,

TEICHMAN COMMISSION COMPANY.

P. S.—A strong feeling pervades the barley market, but buyers are holding back, being well supplied with barley for the present. Please advise us of your offerings and prices.

MCGREGOR, IOWA, *Nov.* 3, 1894.

Teichman Commission Co., St. Louis, Mo.

GENTLEMEN: We have made bill for cars 37506, 2598, 4126, 3728, 18126, 10720 and 6842, at fifty-eight cents net to us, less weighing $1 a car and inspection forty cents, total $2,942.56, and sent same to C., M. & St. P. R. R., and presume they will pay us as soon as they look it up.

We made the bill to the C., M. & St. P., because they collected the whole freight from us from McGregor to St. Louis, and we will hold them responsible if we can for the delivery in St. Louis of the property.

If you were advised by the railway company at your end to sell cars 36088, 4268 and 7552, which were damaged, please let us know whether we better accept the net proceeds of the three cars, and make bill for the loss or make bill for three cars at fifty-eight cents net to us, and you pay the railroad company the proceeds of the three damaged cars.

Yours very truly,

T. McMICHAEL & SON.

ST. LOUIS, MO., *Nov.* 5, 1894.

Messrs. T. McMichael & Son, McGregor, Iowa.

GENTLEMEN: We have your favor of the 3rd inst. and note contents. We also note shipment four cars "A" barley in place of same number of cars burned, which will be delivered on sale.

As we wrote you before, we refused to accept the three cars damaged barley, and you might include them in your claim against the railroad, but if you desire we will request the J. & S. E. line to sell these cars and turn over the net proceeds, so as to enable you to file claim for the difference. Please let us know your wishes in the matter.

Our barley market shows considerable improvement, although prices have not advanced materially.

At what shall we try to sell a round lot of your "A"?

Yours truly, TEICHMAN COMMISSION COMPANY.

350 McGREGOR, IOWA, *Nov.* 8, 1894.

Teichman Commission Co., St. Louis, Mo.

GENTLEMEN: We have considered the matter of the three cars damaged barley, and we think we better take the proceeds of the barley, and make a bill for the difference, as in this way we will not lose the interest on so large part of the money.

Please send us the account sale of the cars, 36088, 4268 and 7552, at your earliest convenience, and greatly oblige.

Yours very truly, T. McMICHAEL & SON.
N.

ST. LOUIS, MO., *Dec.* 1, 1894.

Messrs. T. McMichael & Son, McGregor, Iowa.

GENTLEMEN: We have your favor of the 29th ult., and noted contents.

Herewith we send you a/c sales of the three cars, your damaged barley, which we sold in accordance with instructions of Mr. W. H. Calvert, agent J. S. E. line, and although we have not yet received the money for same, we make returns to you today $897.10, so as to enable you to file your claim. The C., P. & St. L. R. R. (identical to J. S. E.) is anxious for you to hurry filing of claims for all barley; we understand car 5842 claim is still out. Barley entirely neglected today on a/c of unfavorable weather.

Yours truly, E. TEICHMAN, *Sec'y.*

For account of Messrs. T. McMichael & Son, by instructions Mr. W. H. Calvert.

Nov. 14, received from—

Car 14262, Ex.	4,268	barley	29,500	500 # S.
Car 45180, Ex.	7,552	barley	29,825	305 # S.
Car 1350, Ex.	36,088	barley	32,600	629 # S.
			91,925	48 $919 25

Charges.

Freight.	Inspection.		
	Storage.		
Bulking.	Insurance.		
Sack hire.	Weighing,	3.00	
Switching allowed.	$1.00 per car,	19.15	22 15
Commission 1c. bushel.	Net proceeds, E. & O. E.,		$897 10

East St. Louis, Dec. 1st, 1894.

TEICHMAN COMMISSION CO.

ST. LOUIS, *Oct.* 15, 1894.

351

To T. McMichael & Son, McGregor, Iowa:

Sold fifteen thousand sample last shipments, fifty-eight, answer.

TEICHMAN COMMISSION CO.

Dated MCGREGOR, IOWA, *Oct.* 15, 1894.

Teichman Commission Company:

Accept fifty-eight net, fifteen thousand, including five cars to apply, hold higher.

T. McMICHAEL & SON.

ST. LOUIS, *Nov. 2nd*, 1894.

To T. McMichael & Son, McGregor, Iowa:

Will you replace the burnt barley at once, to fill sales?

TEICHMAN COMMISSION COMPANY.

Dated MCGREGOR, IOWA, *Nov. 2nd*, 1894.

Teichman Commission Company:

Yes; will load tomorrow.

T. McMICHAEL & SON.

Affidavit.

STATE OF WISCONSIN, } ss:
La Crosse County, }

I, M. C. M. Lightbody, a notary public in and for said county, hereby certify that in pursuance of the stipulation contained in the caption to the depositions hereto attached and herewith returned, made by the attorneys for the parties, the depositions of Messrs. James N. Gilchrist, Jacob Rau, J. H. Ellsworth, Henry Rippe, S. Y. Hyde, W. W. Cargill and William McMichael were taken before me at my office in the city and county of La Crosse, State of Wisconsin, on the 4th day of February, A. D. 1896, at 9 o'clock in the forenoon. That they were taken at the request of the within-named petitioners upon verbal interrogatories; that such depositions were taken in the suit of The Mercantile Trust Company of New York, complainant, against The Chicago, Peoria and St. Louis Railway Company, defendant, in the matter of the intervening petitions of the Carr, Ryder & Engler Company, Chicago, Milwaukee & St. Paul Railway Company, the S. Y. Hyde Elevator Company, the W. W. Cargill Company, Jacob Rau, James N. Gilchrist and Colin F. Bell, partners under the firm name of Gilchrist and Company, and Thomas McMichael and William McMichael, under the firm name of McMichael & Son, and Henry Rippe and Huntting Elevator Co., pending in the circuit court of the United States in and for the

352 southern district of Illinois; that Burton Hanson, Esq., for the petitioners, and Philip Barton Warren, Esq., for the receiver of said defendant, appeared before me at the taking of said depositions; that the reason for taking said depositions was that the said witnesses live at a greater distance than one hundred miles from the place of trial of said suit; that I am not now and never have

been of counsel or attorney to either of the parties to said suit, nor interested in the event of the cause; that said witnesses, before testifying, were duly sworn by me to testify the truth, the whole truth, and nothing but the truth, relative to said cause; that said testimony was reduced to writing by myself; that by stipulation, the reading over of said testimony to the witnesses and the signatures to the same were waived; that I have sealed up said depositions and directed the same to Mr. James F. Jones, clerk of the above-named court, at Springfield, Illinois.

In testimony whereof I have hereunto set my hand and affixed my official seal this 10th day of February, A. D. 1896.

[SEAL.] M. C. LIGHTBODY,
Notary Public, La Crosse County, Wisconsin.

Notary's fees, $25.68.

(Indorsed:) Filed February 15th, 1896. James T. Jones, clerk.

Stipulation of Parties, Letters and Telegrams to be Filed with Deposition of S. Y. Hyde.

In the Circuit Court of the United States in and for the Southern District of Illinois.

THE MERCANTILE TRUST COMPANY OF NEW YORK, Complainant,
vs.
CHICAGO, PEORIA & ST. LOUIS RAILROAD COMPANY, Defendant.
} Consolidated Cause.

In the matter of the intervening petitions of the Carr, Ryder & Engler Company, Chicago, Milwaukee & St. Paul Railway Company, the S. Y. Hyde Elevator Company, the W. W. Cargill Company, Jacob Rau; James N. Gilchrist and Colin F. Bell, partners under the firm name of Gilchrist & Company, the Huntting Elevator Company, Thomas McMichael & William McMichael, under the firm name of McMichael & Son, and Henry Rippe.

It is hereby stipulated by and between the parties to the above-entitled proceedings that the copies of the letters and telegrams hereto attached may be filed with the deposition of Mr. S. Y.
353 Hyde, which was taken herein before M. C. Lightbody, a notary public, in and for the county of La Crosse and State of Wisconsin, on the 4th day of February, 1896, and attached thereto, and made a part of said S. Y. Hyde's deposition, and that when so filed and attached they may be used with the same force and effect as if the original of said letters and telegrams had been pro-

duced by said S. Y. Hyde at the time said deposition was so as aforesaid taken.

Dated March 4th, 1896.

BURTON HANSON &
GEORGE P. CARY,
Attorneys for said Petitioners.
BLUFORD WILSON &
P. B. WARREN,
Attorneys for the said Defendant, and
C. H. BOSWORTH,
Its Receiver.

(Indorsed:) Filed March 10, 1896. James T. Jones, clerk.

ST. LOUIS, MO., *Oct.* 1, 1894.

S. Y. Hyde Elevator Company, La Crosse, Wis.

GENTS: We have your favor of the 12th and note contents. We have your telegram saying "Make us net offer on 5,000 barley." We wired you "Fifty-five one-half net best possible." We have your answer just now saying "We accept five one-half 10,000 bu." However we can use only 5,000 bushels today, but shall try to sell 5,000 bushels more tomorrow or next day.

Ship as before to us here, via East St. Louis.

Yours truly, TEICHMAN COMMISSION CO.

LA CROSSE, WIS., *Oct.* 15, 1894.

To Teichman Commission Company:

Make us net offer on 5,000 barley.

S. Y. HYDE ELE. CO.

ST. LOUIS, MO., *Oct.* 15, 1894.

To S. Y. Hyde Ele. Co., La Crosse, Wis.:

Fifty-five one-half net best possible. Answer quick.

TEICHMAN COMMISSION CO.

ST. LOUIS, MO., *Oct.* 15, 1894.

To S. Y. Hyde Elevator Co., La Crosse, Wis.:

Ship 5,000 via East St. Louis; trying sell five more tomorrow.

TEICHMAN COMMISSION CO.

354 LA CROSSE, WIS., *Oct.* 15, 1894.

To Teichman Commission Co.:

We accept five half ten thousand; wire billing instructions.

S. Y. HYDE ELEVATOR CO.

ST. LOUIS, MO., *Sept.* 15, 1894.

To S. Y. Hyde Elevator Co., La Crosse, Wis.:

Ship 5,000 like sample to us here via East St. Louis.

TEICHMAN COMMISSION CO.

LA CROSSE, WIS., *Oct.* 17, 1894.

To Teichman Commission Co.:

Examine telegrams you will find we sold you ten barley fifteenth.

S. Y. HYDE ELEVATOR CO.

ST. LOUIS, MO., *Oct.* 17, 1896.

S. Y. Hyde Elevator Co., La Crosse, Wis.

GENTS: We have your telegram and regret to learn you are under a misapprehension of last sale of barley.

We enclose four telegrams which will explain the transaction, and also confirm sale of 5,000 bushels only of your barley.

We have endeavored to sell 5,000 bushels more, but have not succeeded so far, the market being dull and lower.

Yours truly, TEICHMAN COMMISSION CO.

LA CROSSE, WIS., *Oct.* 19, 1894.

Teichman Commission Co., St. Louis, Mo.

ST. LOUIS, MO.

GENTS: Yours containing copies of telegrams from St. Louis is received. We made no mistake. We asked you very plainly for an offer on 10,000 bushels barley; you answered 55½c. net. We accepted it for 10,000 bushels, but it seems the fault is with the telegraph company. We are now tracing the matter up and shall put in a bill against the telegraph company for $25—½c. per bushel on 5,000 bushels.

The telegram that you received reads plainly 5,000 bushels, but the telegram we sent reads plainly 10,000. We will retain all papers to put in with the claim.

Yours truly, S. Y. HYDE ELEVATOR CO.

355

ST. LOUIS, MO., *Oct.* 19, 1894.

S. Y. Hyde Elevator Co., La Crosse, Wis.

GENTS: We have your favor of the 17th, from which we infer that the telegraph office at La Crosse must have made a mistake when wiring us, and no doubt you will find out that we are right in our assertion of having bought but 5,000 bushels.

The barley market is dull and lower and very little demand. Please keep us posted of your offerings of barley, stating lowest prices.

Yours truly,

TEICHMAN COMMISSION COMPANY.

ST. LOUIS, MO., *Oct.* 29, 1894.

S. Y. Hyde Elevator Co., La Crosse, Wis.

GENTS: We have your favor of the 28th and note contents.

Our barley market was fairly active and prices unchanged.

Last night a fire in the yards of the J. S. E. Railway Company in East St. Louis destroyed their freight warehouse, and a great many cars of barley on adjoining tracks. We think likely some of your

barley was amongst the cars destroyed, however, could not find out anything definite today. Will let you know soon as we find out.

We remain, yours truly,
TEICHMAN COMMISSION CO.

LA CROSSE, WIS., *Nov.* 7, 1894.

Teichman Commission Co., St. Louis, Mo.

GENTS: We have your letter regarding the fire at East St. Louis. Will you kindly inform us as soon as possible as to the number of cars we had lost.

Our barley is doing better in Chicago and Milwaukee in proportion than in St. Louis.

Yours truly,
S. Y. HYDE ELEVATOR CO.

LA CROSSE, WIS., *Nov.* 7, 1894.

Teichman Commission Co., St. Louis, Mo.

GENTS: We have your letter written to Mr. Murrell, of Wykoff, in which you say that you want him to ship another car in place of the barley that was burned. Do you want us to do the same with the barley of ours that was burned in the fire? Please answer, and we will do as you say about it; but we just as soon cancel the trade as any other way.

Yours truly,
S. Y. HYDE ELEVATOR CO.

356 ST. LOUIS, MO., *Nov. 9th*, 1894.

S. Y. Hyde Elevator Co., La Crosse, Wis.

GENTS: We have your favor of the 7th inst., and note contents. We thought you were aware that the destroyed barley is to be replaced, and would request you to ship same at your earliest convenience. As written before, better file claim at once for destroyed barley, including Murrell car; other shippers have already handed in their papers.

We have again investigated weights of those eighteen cars, but can't possibly find a mistake, as you will note from enclosed statement, to which the weigher will cheerfully testify before a notary. Today's market was active, and value steady.

Yours truly,
O. L. TEICHMAN.

LA CROSSE, WIS., *Nov.* 12, 1894.

Teichman Commission Co., St. Louis, Mo.

GENTS: We have your letter of the 9th. We *we* will try to load the barley today in place of the barley that was burned. We have written Wykoff to ship another car from there. Receipts have fallen off so they are next to nothing.

We are sold up on barley, and don't care to sell any more just at present.

Yours truly,
S. Y. HYDE ELEVATOR CO.

LA CROSSE, WIS., *Nov.* 9, 1894.

Teichman Commission Co., St. Louis, Mo.

GENTS: We have put in bill for the six cars of barley several days ago to our railroad company here, and it is now in the mill.

Yours truly, S. Y. HYDE ELEVATOR CO.

ST. LOUIS, MO., *Nov.* 12, 1894.

S. Y. Hyde Elevator Company, La Crosse, Wis.

GENTS: We have your favor of the 9th inst., and note contents. Please ship the barley to be replaced, including one "Murrell" car, at your earliest convenience.

Have you no offerings at all? Our barley market was quiet, but a firm undertone pervades same. Enclosing p. c. we are,

Yours truly, O. L. TEICHMAN.

ST. LOUIS, MO., *Nov.* 19, 1894.

S. Y. Hyde Elevator Co., La Crosse, Wis.

GENTS: We have yours of the 17th inst. and note shipment
357 of 5 cars #2 barley in place of cars destroyed; however, we find you shipped 40,000# more in the aggregate and we shall account for the excess at same price. Today's barley market was dull, as buyers are holding off.

Enclosing price current, we are,

Yours truly, O. L. TEICHMAN.

And I further certify that the above and foregoing was all the evidence in said cause, either before the court or the master.

WILLIAM J. ALLEN, *Judge.*

(Indorsed:) Filed June 1st, 1897. James T. Jones, clerk.

Petition of Receiver for Appeal, April 5, 1897.

In the Circuit Court of the United States for Southern District of Illinois.

MERCANTILE TRUST COMPANY
vs.
CHICAGO, PEORIA & ST. LOUIS RAILWAY Company. } Consolidated Cause.

In the matter of the intervening petition of Jacob Rau.

Petition for appeal.

The petition of C. H. Bosworth, receiver herein, showeth unto your honor that a final decree was entered in the above-entitled cause on the 5th day of April, 1897, whereby it was ordered, adjudged and decreed that your petitioner should pay to the said Jacob Rau the sum of $1,444.07; your petitioner further states to your honor that he has assigned errors upon the record in said cause, specifying errors, as he alleges, in the record and decree afore-

said. He therefore prays that your honor will grant an appeal from the said judgment and decree to your petitioner, upon condition that he enters into bond in the sum of five hundred dollars, with surety to be approved by this honorable court, in such time as your honor shall order and decree.

C. H. BOSWORTH, *Receiver*,
By BLUFORD WILSON,
PHILIP BARTON WARREN,
His Solicitors.

358 *Assignment of Errors by Receiver.*

In the Circuit Court of the United States for Southern District of Illinois.

MERCANTILE TRUST COMPANY
vs.
CHICAGO, PEORIA & ST. LOUIS RAILWAY Company. } Consolidated Cause.

In the matter of the intervening petition of Jacob Rau.

Assignment of errors.

And now comes C. H. Bosworth, receiver herein, by Bluford Wilson and P. B. Warren, his solicitors, and says there is manifest error in the record and proceedings in the above-entitled judgment and decree; and specifies the following, to wit:

1. The court erred in overruling the exceptions filed by the receiver to the report of the master.

2. The court erred in failing and refusing to sustain the exceptions filed by the receiver to the report of the master.

3. The court erred in ordering and adjudging that the petitioner was entitled to a valid and first lien on the property of the defendant railway company ahead of the mortgage indebtedness, and upon all of the property and income of the purchasers, purchased at the foreclosure sale of said railway property.

4. The court erred in failing and refusing to order, adjudge and decree that the claim of the intervenor was not entitled to a valid and first lien on the property of the defendant railway company, ahead of the mortgage indebtedness, and upon all of the property and income of the purchasers, purchased at the foreclosure sale of said railway property.

5. The court erred in ordering, adjudging and decreeing that said receiver pay to the intervening petitioner the sum of $1,444.07 with interest thereon from the date of the filing of the master's report, together with the costs in this case.

6. The court erred in ordering, adjudging and decreeing that if said amount was not paid by the receiver within the time there limited, the said receiver be directed to take possession of all of said property and operate the same, and out of the net earnings, pay said amount.

Whereby, the plaintiff in error prays that said judgment and decree be reversed and annulled, with directions to the lower court to dismiss said intervening petition.

BLUFORD WILSON,
PHILIP BARTON WARREN,
Solicitors for C. H. Bosworth, Receiver.

359 *Bond for Appeal by C. H. Bosworth, Receiver.*

In the Circuit Court of the United States for Southern District of Illinois.

MERCANTILE TRUST COMPANY
vs.
CHICAGO, PEORIA & ST. LOUIS RAILWAY COMPANY. } Consolidated Cause.

In the matter of the intervening petition of Jacob Rau.

Bond.

Know all men by these presents, that we, C. H. Bosworth, as receiver of the Chicago, Peoria & St. Louis Railway Company as principal, and Bluford Wilson as surety, are held and firmly bound unto Jacob Rau, in the penal sum of five hundred dollars, for the payment of which, well and truly to be made, the said receiver, as such, binds himself and his successor, and the said surety binds himself, his heirs and personal representatives, jointly and severally, by these presents.

Dated this 31st day of May, 1897.

The condition of this obligation is such that whereas, on the 5th day of April, 1897, in the circuit court of the United States, for the southern district of Illinois, in the above entitled cause, it was ordered, adjudged and decreed by the court that the above-bounden C. H. Bosworth, as receiver, should pay over to the said Jacob Rau the sum of $1,444.07, and from which decree the said receiver has appealed to the United States circuit court of appeals for the seventh circuit, and upon the condition that the receiver should enter into bond in the sum of five hundred dollars with surety to be approved by the court.

Now, therefore, if the said receiver shall well and truly, without delay, prosecute the said appeal with effect, and shall pay all costs and damages that may be adjudged against him, by reason of said appeal, and all costs that may accrue therein in case of dismissal of said appeal by appellant, then this obligation to be null and void, otherwise to remain in full force and effect.

C. H. BOSWORTH,
As Receiver of the Chicago, Peoria & St. Louis Railway Company. [SEAL.]
BLUFORD WILSON. [SEAL.]

Approved:
WILLIAM J. ALLEN,
United States District Judge.

360 *Order Allowing C. H. Bosworth, Receiver, an Appeal and Approving Bond.*

In the Circuit Court of the United States for Southern District of Illinois.

MERCANTILE TRUST COMPANY
vs.
CHICAGO, PEORIA & ST. LOUIS RAILWAY COMPANY. } Consolidated Cause.

In the matter of the intervening petition of Jacob Rau.

Order allowing appeal and approving bond.

Now on this first day of June, 1897, the same being one of the days of the January term, A. D. 1897, of this court, comes C. H. Bosworth, receiver herein, and files his petition for appeal from the order and decree of the court entered herein on the 5th day of April, 1897; and it appearing to the court that said petition is in due form, it is hereby

Ordered, adjudged, and decreed that the prayer of said petition be, and the same is hereby granted; that the appeal be, and the same is hereby allowed to said C. H. Bosworth, receiver, from the said order and decree of April 5th, 1897, to the United States circuit court of appeals for the seventh circuit, upon the said C. H. Bosworth, as such receiver, entering into bond in the sum of five hundred dollars, with surety to be approved by this court; which bond it appears to the court is herewith submitted and approved.

Petition of the C., P. & St. L. R'y Co.

In the Circuit Court of the United States, Southern District of Illinois.

MERCANTILE TRUST COMPANY ET AL.
vs.
CHICAGO, PEORIA & ST. LOUIS RAILWAY COMPANY *et al.* } Consolidated Cause.

In the matter of the intervening petition of Jacob Rau.

Application of the Chicago, Peoria & St. Louis Railroad Company of Illinois to be made party defendant and for leave to appeal.

Now comes the Chicago, Peoria & St. Louis Railroad Company of Illinois, and shows to this honorable court that on the 10th
361 day of July, 1895, a decree was entered in the original foreclosure cause pending in this court, in which The Mercantile Trust Company *et al.* were complainants, and The Chicago, Peoria & St. Louis Railway Company *et al.* were defendants, for the foreclosure and sale of all the property of said defendant railway company; that in and by said decree it was provided, among other

things, that the purchasers of said property and their assigns might be made parties to all intervening petitions filed in such original cause, and might also appeal from any decree that might be entered in this court upon said intervening petitions; that on the 21st day of September, 1895, pursuant to said decree of foreclosure and sale, Stuart Brown, Esq., as master commissioner, sold said property to a reorganizing committee, and pursuant to a decree of this court entered herein on the 1st day of February, 1896, executed a deed to said property to the assignees of said reorganization committee, to wit: the Chicago, Peoria & St. Louis Railroad Company of Illinois; your petitioner further respectfully shows that in and by said decree of February 1, 1896, it was provided that the said Chicago, Peoria & St. Louis Railroad Company of Illinois, shall be substituted in place of said reorganization committee as a party to this cause, and shall have the right to appear herein and to procure and defend such proceedings as it may be advised for the protection of its interests; and shall have all the other rights and privileges to which, under said decree of foreclosure and the order confirming the sale thereunder, the purchaser at such sale is entitled.

Your petitioner further respectfully represents unto this court, that on the 5th day of April, 1897, a final decree was entered in the above-entitled cause, directing C. H. Bosworth, receiver, to pay to said intervening petitioner the sum of $1,444.07; and this petitioner further represents unto this court that it has assigned errors, which it charges were made by this court against it in the matter of said intervening petitions, particularly specifying the errors complained of, and now here presents said assignment of errors to be filed with the clerk of this court; and

Thereupon, this petitioner prays that it may be made a party to said intervening petition, and that this court will grant to it an appeal from said final decree; and that the amount of bond and the time within which such bond and certificate of evidence shall be filed may be fixed by this court.

CHICAGO, PEORIA & ST. LOUIS RAILROAD COMPANY OF ILLINOIS,
By BLUFORD WILSON, *Its Solicitor.*

362 *Assignment of Errors by the C., P. & St. L. R'y Co.*

In the Circuit Court of the United States for Southern District of Illinois.

MERCANTILE TRUST COMPANY
vs.
CHICAGO, PEORIA AND ST. LOUIS RAILWAY COMPANY. } Consolidated Cause.

In the matter of the intervening petition of Jacob Rau.

Assignment of errors.

And now comes the Chicago, Peoria and St. Louis Railroad Company of Illinois, by Bluford Wilson and P. B. Warren, its solicitors

and says there is manifest error in the record and proceedings in the above-entitled judgment and decree; and specifies the following, to wit:

1. The court erred in overruling the exceptions filed by the receiver to the report of the master.

2. The court erred in failing and refusing to sustain the exceptions filed by the receiver to the report of the master.

3. The court erred in ordering and adjudging that the petitioner was entitled to a valid and first lien on the property of the defendant railway company ahead of the mortgage indebtedness, and upon all of the property and income of the purchasers purchased at the foreclosure sale of said railway property.

4. The court erred in failing and refusing to order, adjudge and decree, that the claim of the *inventor* was not entitled to a valid and first lien on the property of the defendant railway company ahead of the mortgage indebtedness, and upon all of the property and income of the purchasers, purchased at the foreclosure sale of said railway property.

5. The court erred in ordering, adjudging and decreeing that said receiver pay to the intervening petitioner the sum of $1,444.07, with interest thereon from the date of the filing of the master's report, together with the costs in this case.

6. The court erred in ordering, adjudging and decreeing that if said amount was not paid by the receiver, within the time there limited, the said receiver be directed to take possession of all of said property and operate the same, and out of the net earnings pay said amount.

Where*by*, the plaintiff in error prays that said judgment and decree be reversed and annulled, with directions to the lower court to dismiss said intervening petition.

BLUFORD WILSON,
PHILIP BARTON WARREN,
Solicitors for Chicago, Peoria and St. Louis Railroad Company of Illinois.

363 *Bond on Appeal of the C., P. & St. L. R'y Co.*

In the Circuit Court of the United States for Southern District of Illinois.

MERCANTILE TRUST COMPANY *vs.* CHICAGO, PEORIA & ST. LOUIS RAILWAY COMPANY. } Consolidated Cause.

In the matter of the intervening petition of Jacob Rau.

Bond.

Know all men by these presents, that we, the Chicago, Peoria & St. Louis Railroad Company of Illinois, as principal, and Bluford Wilson as surety are held and firmly bound unto the said Jacob Rau in the penal sum of five hundred dollars, for the payment of

which, well and truly to be made, the said Chicago, Peoria & St. Louis Railroad Company of Illinois as such binds itself and its successor, and the said surety binds himself, his heirs, and personal representatives, jointly and severally by these presents.

Dated this 17th day of July, 1897.

The condition of this obligation is such that whereas, on the 5th day of April, 1897, in the circuit court of the United States for the southern district of Illinois, in the above-entitled cause, it was ordered, adjudged and decreed by the court that the above-bounden Chicago, Peoria & St. Louis Railroad Company of Illinois should pay over to the said Jacob Rau the sum of $1,444.07, and from which decree the said Chicago, Peoria & St. Louis Railroad Company of Illinois, has appealed to the United States circuit court of appeals for the seventh circuit, and upon the condition that the Chicago, Peoria & St. Louis Railroad Company of Illinois should enter into bond in the sum of five hundred dollars, with surety approved by the court.

Now therefore, if the said Chicago, Peoria & St. Louis Railroad Company of Illinois shall well and truly, without delay, prosecute the said appeal with effect, and shall pay all costs and damages that may be adjudged against it by reason of said appeal, and all costs that may accrue therein in case of dismissal of said appeal by appellant, then this obligation to be null and void, otherwise to remain in full force and effect.

CHICAGO, PEORIA & ST. LOUIS RAILROAD COMPANY OF ILLINOIS,
By F. W. HUIDEKOPER, *Pres't.* [SEAL.]
BLUFORD WILSON. [SEAL.]

Attest: CHAS. D. MEYER, *Secretary.* [SEAL.]

Approved:
WILLIAM J. ALLEN,
United States District Judge.

364 *Order Making C., P. & St. L. R'y Co. Party Defendant, Allowing Appeal, and Approving Bond.*

In the Circuit Court of the United States, Southern District of Illinois.

MERCANTILE TRUST COMPANY ET AL. *vs.* CHICAGO, PEORIA & ST. LOUIS RAILWAY COMPANY *et al.* } Consolidated Cause.

In the matter of the intervening petition of Jacob Rau.

Order of court making the Chicago, Peoria & St. Louis Railroad Company of Illinois party defendant and granting leave to appeal from final decree.

This cause coming on to be further heard upon the application of the Chicago, Peoria & St. Louis Railroad Company of Illinois to

be made a party defendant to the above-entitled intervening petition, and for leave to appeal from the decree entered in this cause on the 5th day of April, 1897, and the court being fully advised in the premises, upon consideration thereof, does hereby grant leave unto said Chicago, Peoria & St. Louis Railroad Company of Illinois to be made party defendant to said intervening petition; and does also hereby grant unto said Chicago, Peoria & St. Louis Railroad Company of Illinois an appeal from said final decree of this court to the circuit court of appeals of the United States for the seventh circuit, upon the said Chicago, Peoria & St. Louis Railroad Company of Illinois entering into bond in the sum of five hundred dollars ($500.00) with approved surety.

Certificate of Clerk.

UNITED STATES OF AMERICA, } ss:
Southern District of Illinois, }

I, James T. Jones, clerk of the circuit court of the United States, in and for the southern district of Illinois, do hereby certify that the foregoing is a true and complete copy of the papers filed and proceedings thereon had, in the matter of the intervening petition of Jacob Rau, filed in a certain cause, wherein The Mercantile Trust Company of New York is complainant, and The Chicago, Peoria & St. Louis Railway Company is defendant, as truly and completely as the same appear of file and record in my office.

In witness whereof, I have hereunto set my hand and affixed the seal of said court, at Springfield, in said district, this 10th [SEAL.] day of September, in the year of our Lord one thousand eight hundred and ninety-seven, and of our Independence, the one hundred and twenty-second year.

JAMES T. JONES, *Clerk.*

365 At a regular term of the United States circuit court of appeals for the seventh circuit, begun and held at the United States court-rooms, in the city of Chicago, in said seventh circuit, on Monday, the fifth day of October, 1896, of the October term, in the year of our Lord one thousand eight hundred and ninety-six and of our Independence the one hundred*th* and twenty-first year.

366 And afterwards, to wit: on the twentieth day of August, 1897, in the October term last aforesaid, there was filed in the clerk's office of said court a copy of an order of the circuit court of the United States for the southern district of Illinois, which said order was in the words and figures following, to wit:

Copy of Order. Filed Aug. 20, 1897.

In the Circuit Court of the United States for the Southern District of Illinois.

SATURDAY, *June* 26, 1897.

MERCANTILE TRUST COMPANY
vs.
CHICAGO, PEORIA & ST. LOUIS RAILWAY Company. } Consolidated Cause.

In the matter of the intervening petitions of the Chicago, Milwaukee & St. Paul Railway Company, Carr, Ryder & Engler Company, S. Y. Hyde Elevator Company, W. W. Cargill Company, Jacob Rau; James N. Gilchrist and Colin F. Bell, partners under the firm name of Gilchrist & Company; Huntting Elevator Company, McMichael & Son, and Henry Rippe.

On motion of the receiver in this cause by his solicitor, it is ordered by the court that the time of the receiver to file the record in the matters of said intervening petitions to the United States circuit court of appeals for the seventh circuit be extended thirty (30) days.

A true copy.

[SEAL.] JAMES T. JONES, *Clerk.*

367 And afterwards, on the same day, to wit: on the twentieth day of August, 1897, in the October term last aforesaid, there was filed in the clerk's office of said court a copy of a further order of the United States circuit court for the southern district of Illinois, which said order was in the words and figures following, to wit:

Copy of Order. Filed Aug. 20, 1897.

In the Circuit Court of the United States for the Southern District of Illinois.

WEDNESDAY, *July* 21, 1897.

MERCANTILE TRUST COMPANY
vs.
CHICAGO, PEORIA & ST. LOUIS RAILWAY Company. } Consolidated Cause.

In the matter of the intervening petitions of the Chicago, Milwaukee & St. Paul Railway Company, Carr, Ryder & Engler Company, S. Y. Hyde Elevator Company, W. W. Cargill Company, Jacob Rau; James N. Gilchrist and Colin F. Bell, partners under the firm name of Gilchrist & Company, Hu-tting Elevator Company, McMichael & Son, and Henry Rippe.

This cause coming on to be further heard upon the application of the receiver and the Chicago, Peoria & St. Louis Railroad Company

of Illinois, for an extension of time to file records in the United States circuit court of appeals for the seventh circuit, and the court being duly advised in the premises, upon consideration thereof, does hereby order that the time to file said records be extended till the 30th day of August, A. D. 1897.

A true copy.
[SEAL.]

JAMES T. JONES, *Clerk.*

368 And afterwards, to wit: on the fourteenth day of September, 1897, in the October term last aforesaid, came the appellee, by his counsel, Mr. Burton Hanson and Mr. George P. Cary, and filed their appearance in the clerk's office of said court, which said appearance was in the words and figures following, to wit:

Appearance. Filed Sept. 14, 1897.

United States Circuit Court of Appeals for the Seventh Circuit, October Term, 1896.

C. H. BOSWORTH, Receiver, Appellant,
vs.
JACOB RAU, Intervenor. } No. 452.

The clerk will enter my appearance as counsel for the intervenor.

BURTON HANSON.
GEORGE P. CARY.

NOTE.—Must be signed by a member of the bar of the United States circuit court of appeals, for the seventh circuit. Individual and not firm names must be signed.

Endorsed: Filed Sept. 14, 1897. Oliver T. Morton, clerk.

369 And afterwards, to wit: on the fifteenth day of September, 1897, in the October term last aforesaid, came the appellant, by his counsel, Mr. Bluford Wilson, and filed in the clerk's office of said court his appearance, which said appearance was in the words and figures following, to wit:

Appearance. Filed Sept. 15, 1897.

United States Circuit Court of Appeals for the Seventh Circuit, October Term, 1896.

C. H. BOSWORTH, Receiver, Appellant,
vs.
JACOB RAU, Intervenor. } No. 452.

The clerk will enter my appearance as counsel for the appellant.

BLUFORD WILSON.

NOTE.—Must be signed by a member of the bar of the United States circuit court of appeals. Individual and not firm names must be signed.

Endorsed: Filed Sept. 15, 1897. Oliver T. Morton, clerk.

370 And afterwards, on the same day, to wit: on the fifteenth day of September, 1897, in the October term last aforesaid, came the appellant, by his counsel, Mr. P. B. Warren, and filed in the clerk's office of said court his appearance, which said appearance was in the words and figures following, to wit:

Appearance. Filed Sept. 15, 1897.

United States Circuit Court of Appeals for the Seventh Circuit, October Term, 1896.

C. H. BOSWORTH, Receiver, Appellant,
vs.
JACOB RAU, Intervenor. } No. 452.

The clerk will enter my appearance as counsel for the appellant.
P. B. WARREN.

NOTE.—Must be signed by a member of the bar of the United States circuit court of appeals, for the seventh circuit. Individual and not firm names must be signed.

Endorsed: Filed Sept. 15, 1897. Oliver T. Morton, clerk.

At a regular term of the United States circuit court of appeals for the seventh circuit, begun and held at the United States court-rooms, in the city of Chicago, in said seventh circuit, on Monday, the fourth day of October, 1897, of the October term, in the year of our Lord one thousand eight hundred and ninety-seven and of our Independence the one hundred and twenty-second year.

371 And afterwards to wit: on the fourth day of October, 1897, in the October term last aforesaid, in the record of proceedings thereof in said entitled cause, appears the following entry, to wit:

Order of Oct. 4, 1897.

MONDAY, *October* 4, 1897.

Before Hon. William A. Woods, circuit judge; Hon. James G. Jenkins, circuit judge; Hon. John W. Showalter, circuit judge.

C. H. BOSWORTH, Receiver, Appellant,
vs.
JACOB RAU, Intervenor. } 452.

Appeal from the circuit court of the United States for the southern district of Illinois.

It is ordered by this court that this cause be, and the same is hereby placed on the calendar for this session of this court. And it is further ordered that this cause may be argued with cause

No. 442. C. H. Bosworth, receiver, etc., *vs.* Chicago, Milwaukee & St. Paul Railway Company, intervenor.

372 And afterwards, on the same day to wit: on the fourth day of October, 1897, in the October term last aforesaid, the following further proceeding were had and entered of record, to wit:

Order of Oct. 4, 1897.

MONDAY, *October* 4, 1897.

Before Hon. William A. Woods, circuit judge; Hon. James G. Jenkins, circuit judge; Hon. John W. Showalter, circuit judge.

C. H. BOSWORTH, Receiver, Appellant,
vs.
JACOB RAU, Intervenor. } 452.

Appeal from the circuit court of the United States for the southern district of Illinois.

It is now here ordered that this cause be, and the same is hereby set down for hearing Monday, October 25, 1897.

373 And afterwards, to wit: on the twenty-fifth day of October, in the October term last aforesaid, the following further proceedings were had and entered of record, to wit:

Hearing, Oct. 25, 1897.

MONDAY, *October* 25, 1897.

Before Hon. William A. Woods, circuit judge; Hon. James G. Jenkins, circuit judge; Hon. John W. Showalter, circuit judge.

MERCANTILE TRUST COMPANY
vs.
CHICAGO, PEORIA & ST. LOUIS RAILWAY COMPANY ET AL. } 452.

In the matter of the intervening petition of Jacob Rau, intervenor.

Appeal from the circuit court of the United States for the southern district of Illinois.

Now this day come the parties by their counsel and this cause now comes on to be heard on the printed records and briefs of counsel and on oral argument by Mr. Bluford Wilson, counsel for appellant, and by Mr. Burton Hanson, counsel for appellee; and the court having heard the same takes this matter under advisement.

374 And afterwards, to wit: on the twenty-fifth day of February, 1898, in the October term last aforesaid, there was filed in the clerk's office of said court, the opinion of the court, which said opinion was in the words and figures following, to wit:

Opinion. Filed Feb. 25, 1898.

In the United States Circuit Court of Appeals for the Seventh Circuit, October Term, 1897.

C. H. BOSWORTH, Receiver, ET AL.
vs.
THE CHICAGO, MILWAUKEE AND ST. PAUL RAILWAY Company, Jacob Rau, The Huntting Elevator Company, and Carr, Ryder and Engler Company, Intervenors in the Case of Mercantile Trust Company *versus* Chicago, Peoria and St. Louis Railway Company *et al.* } Nos. 442, 452, 453, and 454.

Appeals from the circuit court of the United States for the southern district of Illinois.

Before Woods, Jenkins, and Showalter, circuit judges.

These appeals are from decrees against the appellant, C. H. Bosworth, as receiver of the Chicago, Peoria and St. Louis Railway Company in favor of interveners in the case of Mercantile Trust Company *vs.* Chicago, Peoria and St. Louis Railway Company, wherein the receiver was appointed, for damages caused by the burning of freight cars and their contents, of which the appellant is alleged to have had possession as a common carrier, on the evening of October 28, 1894, at East St. Louis. By an amendment the petitions were made to charge that while the cars were still in the possession of the receiver at East St. Louis he negligently caused and permitted them to be placed in proximity to a
375 wooden warehouse filled with baled and loose hay which was exposed to fire from passing locomotives and in some manner caught fire which, communicating to the cars, caused the damage complained of. The amounts decreed to be paid to the interveners, respectively, were: To the Chicago, Milwaukee and St. Paul Railway Company, $9,033.73; to Jacob Rau, $1,144.07; to the Huntting Elevator Company, $2,600.95; to the Carr, Ryder and Engler Company, $777.26, and to others, not parties here, whose decrees it has been agreed shall abide the result of these appeals, various sums aggregating near $10,000. The facts in the main were agreed upon and the controlling question is whether the cars and goods at the time of destruction were in the possession of the receiver, or had passed into the possession of the Terminal Railroad Association of St. Louis, which owned the tracks upon which the cars were standing when they were consumed.

It appears that not having adequate yard facilities of its own at East St. Louis, the Chicago, Peoria and Saint Louis Railway Company on August first, 1892, entered into an agreement with the Terminal Railroad Association for the use of its tracks, and either by acquiescence or by formal stipulation that agreement remained in

force between the Terminal Association and the receiver. Only the first, fourth and fifth clauses need be quoted:

"It is agreed that the party of the first part (the Terminal Railroad Association) shall furnish the necessary yard room and track facilities in their yards in East St. Louis, Illinois, as now located, and the necessary switch-engines and yardmen to do the switching of the party of the second part, in the making up and breaking up of all freight trains that depart from, and arrive at East St. Louis, and to furnish storage room for a reasonable number of cars necessary to properly take care of and handle the business of the party of the second part, not exceeding one hundred and fifty (150) cars at any one time; and the charge for the facilities and the work above named, shall be at the rate of fifty (50) cents per loaded car in and out, except cars on which the party of the first part receives a bridge toll, which will be handled free; empty cars in and out free.

Fourth. All cars consigned to and from the East St. Louis freight-house of the party of the second part, to be switched to and from the Wiggins transfer tracks without extra charge. Regular switching charges and rules to apply on all other cars to and from connections, the party of the first part to be governed in making its collections by instructions shown on billing to it as to who
376 should pay. In the absence of any instructions the switching charges will follow the car.

Fifth. The party of the first part to furnish track room upon which the engines of the party of the second part can be switched and cared for and turned, as may be required; the care of such engines to be under the supervision of the party of the first part; the price for the service rendered to be agreed upon by the master mechanic of the party of the first part and the superintendent of motive power and machinery of the party of the second part."

"These tracks of deposit," says the master's report, "were not exclusively used by the C., P. & St. L. but the cars seem to have been always placed upon them." It is apparent from the evidence, however, that the receiver had no voice in determining where a car should be placed, or with what care it should be guarded.

For the purpose of saving the labor and expense of making proof the parties stipulated that the property described in the several petitions was destroyed as stated; that the Carr, Ryder and Engler Company, a corporation, on October 20, 1894, delivered the property described in its petition to the Chicago, Milwaukee and St. Paul Railway Company at Dubuque, Iowa, loaded in car number 1004 of the Rock Island and Peoria Railway Company, and consigned for transportation as per bill of lading to the May & Thomas Hardware Company, Birmingham, Alabama, by way of East St. Louis, Illinois; that the Chicago, Milwaukee and St. Paul Railway Company was the owner of the thirty-eight cars described in its petition; that during the evening of October 28, 1894, those cars while on the tracks of the Terminal Railroad Association of St. Louis, commonly used by the receiver under the agreement between that association and the Chicago, Peoria and St. Louis Railway Company, dated August 1, 1892, were damaged by fire to the total amount of

$9,033.73; that the cars were consigned as per bills of lading and waybills introduced in evidence; that Jacob Rau of Wykoff, Minnesota, at the times and places alleged in his petition delivered to the Chicago, Milwaukee and St. Paul Railway Company two carloads of barley, consigned to the Orthwein Grain Company, St. Louis, Missouri, by way of East St. Louis, Illinois; that receipts in the form of exhibits attached to the stipulation were given by the railway company at the time the barley was received for transportation, and that when destroyed the barley belonged to the petitioner and was of the value of $1,144.07. The stipulation in respect to the shipment of the Huntting Elevator Company is in the same words, except that the consignee named is the Teichman Commission Company, and the value of the goods destroyed is stated
377 to have been $2,650.95. Like stipulations were made concerning the cases of other interveners from whose decrees there has been no formal appeal. The agreement was afterwards amended by striking out the clause in respect to the ownership of the barley shipped by the several petitioners except Rau and one other whose consignments were for sale on commission.

It is contended by the appellant that the destination of the cars consumed except five, as shown by the waybills and receipts or copies thereof introduced in evidence by the interveners, was East St. Louis, although in the column under the head of "Marks and consignees" the name of the consignee and the words "St. Louis, Missouri," appear.

The shipments of barley, except those for sale on commission, were made in pursuance of telegraphic correspondence showing offers of net prices by the brokers or commission men at St. Louis accepted by the shippers, and it is contended by the appellant that on delivery of the grain to the carrier the title passed to the consignees and that the interveners have no right of action. On the other hand, proof was offered to show that delivery at St. Louis was intended by the parties, and that on that understanding other shipments were made after the fire in lieu of those destroyed.

At the time of the fire the cars destroyed, together with others which were injured and afterwards repaired, had been on the tracks of the Terminal Association for various periods of time, one since the 28th day of September preceding, and of those received in October there arrived on the 10th one, and on the 16th one, on the 24th four, on the 25th eighteen, on the 26th twelve, on the 27th at 7.55 a. m. nine, at 6.44 p. m. two, and on the 28th at 6.55 a. m. four, at 1.45 p. m. one, and at 2.57 p. m. car 1004. Of the aggregate number, fifty-four, all but eight were cars of the Chicago, Milwaukee & St. Paul Railway Company.

In respect to the manner in which the cars brought in over the receiver's road were handled and disposed of by the employés of the receiver and of the Terminal Association under their agreement, it appears that after an incoming train had been broken up and the cars placed on the tracks of the Terminal Company they remained there in the physical control of that company until the consignee, to whom the receiver was accustomed to send prompt

notice of the arrival of a car consigned to him, should indicate the particular destination, which might be on the east or west side of the river or a point on the line of another railroad, whereupon the receiver would make out and deliver to the Terminal Company a new waybill on which that company would transfer the car
378 as directed. It appears further that on the delivery of such a new waybill, and not sooner, it was the custom of the receiver if the car belonged to another company to send notice to that company that the car had been delivered to the Terminal Association, it being the custom of railroad companies in that way to keep each other advised of the disposition and whereabouts of their respective cars.

It satisfactorily appears further that it was the custom of brokers and buyers at St. Louis to leave in the cars until sold certain classes of goods, and particularly consignments of barley received upon the tracks of the Terminal Railroad Association, whether billed to St. Louis or East St. Louis, the mode of selling goods so held being by samples taken on the arrival of cars by agents of the consignees employed to visit daily the yards for that purpose. It further appears that the receiver at the hearing before the master made a statement of facts which he proposed to prove by some of the consignees of the barley in question, and asked time to produce the witnesses, and that in order to avoid delay it was agreed by the interveners that if produced, the witnesses would testify, as stated by counsel for the receiver, to the effect following:

"That the Terminal Railroad Association personally solicited this particular barley business, originating on the Chicago, Milwaukee and St. Paul railroad, upon which this controversy is pending; that these solicitations by the Terminal Railroad Association were made to all barley dealers in St. Louis to whom the particular consignments of barley were made which are now in litigation; that the Terminal Railroad Association as an inducement to barley dealers and shippers, agreed to hold the cars on their tracks at East St. Louis and offered other facilities in and about their yards at East St. Louis, by which the St. Louis Terminal Railroad Association succeeded in securing the business of all the shippers, by that term I mean the consignees and shippers, except the business of the John Wall Commission Company, whose business was being handled by the Wiggins Ferry Company, a competing line with the St. Louis Terminal Railroad Association, and that at a later day they also secured the business of this last-named firm. And that this solicitation was made in the interest of the Terminal Railroad Association for the express purpose of having the business sent down the east side of the Mississippi river so as to give them the benefit of the transportation across the river at East St. Louis to St. Louis, in competition with lines west of the Mississippi river."

In a general report of the master touching all the cases it is
379 said "that no notice was sent to the owner, shipper or consignee of the arrival of said cars at St. Louis, or of the delivery of them to the Terminal railroad," and in the special report upon the case of Jacob Rau it is said concerning his cars that "no

notice of their arrival was given to owner." It is not reported that the consignee of any car was not notified by the receiver and did not otherwise have knowledge before the fire that the car had arrived and was upon the Terminal tracks, subject to his order. On the contrary, the proof is that the consignees received from the shippers immediate notice by mail of each consignment and, in addition, received a sample of the grain which, according to the report, the shippers were accustomed to send by express. Informed in this way of the number and contents of a car in transit the agent of the consignee in regular and daily attendance in the yards for that purpose was able to take and, there being no evidence to the contrary, presumably did take, the required sample from each car promptly upon arrival. This conclusion is fortified by a letter of the Orthwein Grape Company to one of the interveners in which it is said: "Two of your cars (giving the numbers) arrived this afternoon," and by the testimony of Rau to the effect that his consignee had possession of samples of his grain taken from the cars on the day of their arrival at East St. Louis. The proof, in addition to the facts stated, being that notice of the arrival of cars was regularly and promptly sent to the consignees by the employés of the receiver, the fair inference in the absence of contrary evidence is that notices of the arrival of the cars in question were sent and were duly received by the consignees.

WOODS, circuit judge, after making the foregoing statement:

If the facts were simply that under the agreement of 1892 and in accordance with the custom which had grown up cars from the receiver's road were taken by the Terminal Association and placed upon its tracks and permitted to remain there until the receiver, at the request of the consignee, should make out and deliver to the Terminal Association new waybills showing a particular destination, it would perhaps be true as contended in behalf of the interveners that the responsibility of the receiver for the cars with their contents which were destroyed had not ceased, because the waybills under which they could have been transferred had not been made out. But besides the fact of the custom the undisputed evidence is that shipments of barley originating on the Chicago, Milwaukee & St. Paul railroad, including the consignments in dispute, were made to or by way of East St. Louis in order that the cars should come into the possession of that association for trans-
380 fer in pursuance of an understanding amounting to an agreement between the association and the consignees that the association should hold the cars on its tracks and afford other facilities about its yards at East St. Louis until the consignee should determine and give notice to what point a transfer should be made. That agreement was equivalent to a specific direction by the consignee upon the receipt of each car by the Terminal Association that the car should be held for further orders; and in that situation, whatever otherwise might have been his duty, the receiver was under no obligation to notify the consignee of the arrival of a car, and it is not material whether such notice was given or not. The

delivery to the Terminal Association was complete, and no delay in making out new waybills or in sending junction notices to the owners of the cars, if owned by other companies, could be of force to show a continued legal or constructive possession by the receiver. The consignees, whether buyers of the grain or agents of the shippers, it is well settled, had authority in the absence of notice to the contrary to direct what disposition should be made of the cars on their arrival at East St. Louis, and the legal result is the same as if the Terminal Company's possession and detention of the cars had been with the consent or by direction of the interveners themselves.

In view of the custom which prevailed and of the agreement between the Terminal Association and the consignees of barley at St. Louis, the liability of the receiver as carrier ceased once the cars had been placed upon the Terminal tracks. From that time the question was not whether the placing of the cars upon its tracks by the Terminal Association operated to transfer the liability of a carrier from the receiver to the Terminal Association, but was whether the liability of a bailee for hire, or as warehouseman, was on the receiver or on the Terminal Association. It is doubtless true in a general sense that the shipper of goods or the owner of goods shipped is entitled to the common-law liability of the carrier until the goods shall have reached their destination, but that right, it must be clear, does not exist when the line of transportation is not to be continuous, as when to the knowledge and with the consent of the shipper there must be on the way a place and period of storage; and when the right exists it is one which the shipper or his agent, the consignee, may waive, and in this case it was waived by the consignees when they agreed and directed that the cars and contents should be held on the Terminal tracks to await their specific orders for transfer. If the original destination was St. Louis and was so in-

381 tended by the shippers, no notice of any restriction upon the authority of the consignees to change the destination was given, and when by their direction the course of transit was broken or suspended the liability of the carrier ceased, and under the facts, as they appear, the liability of bailee commenced, on the part either of the receiver or of the Terminal Association, and the question is, on which? It does not solve this question to say that the action of the Terminal Association, under its contract with the receiver to break up trains and to remove the cars to certain tracks, did not constitute a delivery. Under that contract and under the custom which had prevailed, if the proof went no further, it is conceded that the Terminal Association would have been under obligation to obey the orders of the receiver with respect to the cars, but when in addition to that contract and the custom it is shown that the Terminal Association was under a separate agreement with the consignees, to which the receiver was not a party, and of which it does not appear that he had knowledge, to hold on its tracks all cars consigned to them until they should give notice of the desired transfer, a radically different case is shown. Under that agreement it was not material, nor was it contemplated, that the Terminal Association should know of the final destination of any car or of its

contents until the time for transfer should come. The purpose of the agreement was to leave the destination undetermined until the last. No liability as common carrier could attach to the Terminal Association until a forward movement or transfer of the car should be ordered, and there being, as already explained, no question of liability as a carrier the question of formal delivery, as affecting the existence of such liability or its transfer from one company to the other, was in no sense involved. Whether the receiver, either in ignorance of the agreement of the association with the consignees, or for other reason growing out of the custom of business between the two companies, supposed himself to be in some sense responsible for the consignments in question is not material. Neither is it important, if true, that the Terminal Association undertook to furnish terminal or yard facilities which it was the duty of the receiver's company to provide. If otherwise there would have been such a duty on the receiver he was relieved of the duty in respect to these cars by force of the agreement between the consignees and the Terminal Association. To a consignee who has provided a place for the receipt and storage of his goods a carrier is certainly under no obligation to afford like facilities; and if by reason of an independent contract the carrier has a right to make delivery or to store
382 goods in the same place provided by the consignee the carrier does not on that account remain responsible to that consignee for the safety of his goods after depositing them in that place. These consignees having bargained with the Terminal Association to hold their cars upon its tracks, the tracks became theirs for that purpose, just as much as otherwise they would have been the tracks of the receiver under his agreement with the Terminal Association, and the cars having been placed upon those tracks the receiver's possession and responsibility ceased, as they would have ceased if the cars had been placed on private tracks of the consignees; and whether waybills had been handed over or remained in the possession of the receiver could be of no possible significance.

The principle of law underlying these propositions, if they are not to be regarded as elementary, are well established and familiar, and are quite in harmony with the opinion in Mount Vernon Company *v.* Alabama Great Southern Railroad Co., 92 Ala., 296, and other cases to which reference has been made. See also Pratt *v.* Railway Co., 95 U. S., 43. While it is conceded that ordinarily there must be a continuous liability as common carrier upon somebody until the goods have arrived at their destination, manifestly the rule does not apply when, as here, the shipper, through his agent the consignee, has consented to an interruption of the course of transit and to the holding of the goods meanwhile by a bailee of his own selection. The supposed difficulty with the proposition that the Terminal Association was still in possession, because it did not know that these cars were for St. Louis, nor to whom they were consigned, nor whether they might not be intended for the Wiggins Ferry Company, and in the usual course of business could not know until waybills had been delivered to it, is not substantial. There is no evidence that the association did not in fact know that the cars were

for consignees in St. Louis for whom it had agreed to hold cars. The evidence shows that sometimes the agents of the association at the instance of consignees called for cars for which no waybills had been requested of the receiver by the consignees. If the information had been deemed important it was easy to obtain it from the consignees and their agents, and doubtless from the agents of the receiver, without waiting for the time of transfer when customarily waybills were called for and delivered. The information, however, was not in fact important, because until the particular destination of a car had been determined by the consignee the responsibility of the association as bailee was only for ordinary care and could not be greater or less whether the name of the consignee
383 or the destination of the car were known or unknown. Indeed, the association under its contract with the receiver was under the same liability to the receiver, if the receiver remained liable to the owner, and on no possible supposition or theory is it perceived that its liability could be affected by its knowing or not knowing whether particular cars came within the scope of its agreement with the consignees at St. Louis. Besides, it was not a part of the agreement that the Terminal Association would hold for the consignees cars received upon its tracks which it knew to be or when it knew them to be so consigned. Such a limitation upon the scope of the agreement is not even suggested by the evidence, would be in itself unreasonable, and presumably was not in the mind of either party. Even under the agreement with the receiver the actual possession and physical control of the cars passed immediately upon arrival to the Terminal Association, and if consigned to parties for whom the association had agreed to hold them there is no reason suggested for continued liability of the receiver, in any character, except the lack of the mere formality of making out and delivering to the Terminal Association a waybill, which in the course of business could not be made out until the consignee in his own pleasure should give the necessary direction; and if that had been done the Terminal Association would have become liable as a carrier to make an immediate transfer to the place or in the direction of ultimate destination. In other words, on the theory that the Terminal Association's liability to the consignees or shippers could arise only upon receipt in the usual course of waybills from the receiver, it could never have become liable as bailee under its agreement with the consignees to hold the cars for them, and could have incurred liability only as a carrier to make transfers as ordered. It is evident, moreover, that the receiver was not bound to make out new waybills, and might have avoided this formal objection to his discharge from liability, if he had known of the agreement of the Terminal Association with the consignees, by delivering or tendering the original waybills on the arrival of the cars, or at a later time, to the Terminal Association; but that again would have been only a formality, without substantial effect upon the relations or rights of the parties, and therefore was not necessary. It is perhaps true, that if the responsibility of the receiver had not ceased, the owners, whether consignees or shippers, would have had their election to sue the

receiver for a breach of contract as bailee, or the Terminal Association for negligently causing the injury; but having themselves entered into an understanding with the Terminal Association, whereby it was to hold the goods for them, they necessarily waived any right to look further to the responsibility of the receiver, and upon the destruction of their property, through the fault of the Terminal Association in exposing it to what the master has characterized as a veritable fire-trap, they had upon the facts disclose, and presumably have yet, a clear right of action against that association upon its contract with them, and in such an action, if brought, the association could hardly be heard to say that no liability had arisen under that contract because it had not received waybills or did not know to whom the cars had been consigned.

384

If it appeared that the receiver had knowledge of the agreement between the Terminal Association and the consignees the plain, if not necessary, inference would be that it was merely for the convenience of the parties that the receiver did not give the original waybills or copies to the Terminal Association upon the arrival of cars but waited until the consignee had determined the final destination and then made out new waybills; and, if it be assumed that the receiver was ignorant of that agreement, it is no less clear that the Terminal Association and the consignees, solely for their own convenience, continued according to the custom not to call upon the receiver for waybills until by the determination of the consignees the cars were to be forwarded, and the legal consequence should be and is the same as if the receiver had possessed full knowledge of the situation; or, if there be a difference, it is in the receiver's favor. The principle involved is well illustrated, upon a converse state of facts, in the case of The St. Louis, etc., Railway *v.* Commercial Ins. Co., 139 U. S., 223. There the owners of cotton destroyed by fire and the railroad company which was sued were, as here, in separate contract relations with the Union Compress Company, which, like the Terminal Association here, held the goods as bailee either for the owner or for the railroad company. Pursuant to a custom which had grown up for the convenience of all parties the railway company had been in the habit of giving to the owners of cotton in exchange for the receipts of the compress company through bills of lading before the cotton had been loaded upon the cars and had been accustomed to give the compress company notice of the fact of loading with direction in each instance to ship the cotton on the railroad by a route and to an address named, but in this case no bill of lading had been given and before loading the cotton was burned. The railroad company was charged with a negligent failure, though often requested by the compress company, to furnish transportation according to its contract with that company, and one of the questions in the case was how far the railway company's liability in the action was affected by the fact that it had issued bills of lading for other cotton which formed a part of the accumulated mass which was burned in the street, no waybill hav-

385

ing been given for the 340 bales for the destruction of which the suit was brought. "This cotton certainly," says the opinion, "was in the exclusive possession and control of the compress company. The railway company had not assumed the liability of a common carrier or even of a warehouseman with regard to it; had given no bills of lading for it; had no custody or control of it, and no possession of it, actual or constructive; and had no hand in placing or keeping it where it was." And speaking directly in respect to the effect of the issuing of bills of lading upon the company's liability for cotton covered thereby, the court said: "There is nothing else in the case which has any tendency to show that the railway company had or exercised any control or custody of the cotton, or of the place where it was kept by the compress company before it was put upon the cars by that company. * * * The evidence warranted, if it did not require, the inference that the bills of lading were issued merely for the convenience of all parties, and with no intention of making any change in the actual or legal custody of the cotton until it was so loaded. California Ins. Co. *v.* Union Compress Co., 133 U. S., 387–415. Upon the facts of this case it may well be doubted whether the liability of the railway company as a common carrier began before the cotton had been received upon its cars and had thereby come into its actual and exclusive possession and control." In California Insurance Co. *v.* Union Compress Co. referred to above, in respect to a similar issue of bills of lading, it is said: "At most, the railroad companies, by acquiring the receipts of the plaintiff and issuing bills of lading for the cotton took only constructive possession of it; and the plaintiff, retaining actual and physical possession of it, did not lose any element of possession necessary to give it the right to effect insurance for its own benefit." So here upon the facts stated the non-delivery of waybills by the receiver to the Terminal Association in any view can constitute evidence only of constructive possession, and, since in that respect a waybill is less significant than a bill of lading, should not, in view of the agreement between the consignees and the Terminal Association, be deemed to be controlling or even persuasive evidence of continued possession, even constructive, on the part of the receiver, and of consequent responsibility for the safe keeping of the cars.

386 Two things are necessary to the beginning of liability as a carrier, namely, delivery—that is to say a transfer of the physical possession of the goods—and shipping directions; while to the initiation of liability merely as a bailee for hire notice of ulterior destination is unimportant and only possession of the goods is essential. And it is on this distinction that upon a delivery thereof into the possession of the Terminal Association the liability of the receiver ceased and that association, if any one, became responsible for such cars and contents as were covered by its agreement with the consignees, whether it had or had not received notice of the ultimate destination of particular cars.

It is conceded that a railroad company is responsible for the cars of another company in use upon its road under the same rule of liability as for the goods carried therein, and it follows that, not

being responsible in these cases for the contents of the cars of the Chicago, Milwaukee & St. Paul Railway Company, the receiver is not responsible for the loss of the cars themselves.

The agreements and the custom under which cars were transferred at East St. Louis of course had no application to the case of the Carr, Rider & Engler Company, and the decree in favor of that company was right. No cessation in the course of carriage was contemplated, and by the rule that the liability of one carrier in a continuous transit does not cease until the liability of the connecting carrier begins, the receiver must be held responsible for the loss of the goods of that company. Though in physical possession, under its agreement with the receiver of the car in which the goods were being transported, the Terminal Association had not become responsible as a carrier therefor because it had not been put in possession of a waybill or other form of information on which it could proceed with the carriage. In respect to that car, no interruption in the course of transit having been contemplated or authorized either by the shippers or by the consignees, it may be said that the receiver, as one of the connecting carriers, was under the double duty—it would perhaps be proper to say as agent for the shipper—to deliver possession and to communicate shipping directions to the next carrier, and that duty in one aspect not having been performed his liability as carrier had not ceased.

JENKINS, *Circuit Judge:*

I concur that the appellant should be held liable for the destruction of the property contained in car numbered 1004 and this because he had not divested himself of his liability as insurer
387 by delivery of car and its contents to the next succeeding carrier. The owner or shipper of goods to be carried over connecting lines of railway is entitled to the protection afforded by the common law liability of a carrier until the goods have arrived at their destination and a reasonable time has elapsed after their arrival to accept delivery of them; and with respect to connecting lines each carrier assumes the responsibility of an insurer while the goods are in transit over its particular line and until delivery to the next succeeding carrier. Railroad Company *v.* Manufacturing Company, 16 Wall., 318; Pennsylvania Railroad Company *v.* Jones, 155 U. S., 333, 339.

What shall constitute a delivery which relieves the one carrier from and imposes upon the succeeding carrier the burden of an insurer of the property in transit has been the subject of some contention in the courts. The result of the discussion has been, as I think, to establish a rule that is at all times protective to the shipper or owner and imposes the burden of insurer upon the carrier with whom it should be properly lodged. No better expression of the rule can be found than that declared by the supreme court of Alabama, Clopton, J., delivering the opinion, in Mount Vernon Co. *v.* Ala. Gt. Southern Railroad Co., 92 Ala., 296, 298: "The duties and obligations of the common carrier do not commence until there has been a complete delivery of the goods—until they are placed

in his custody and under his exclusive control for immediate transportation. Though the goods may be delivered, if transportation is to await shipping orders or directions, or some act to be done by the consignor before they are forwarded; or, if they cannot be at once put *in transitu* because of the failure of the shipper to give shipping orders or directions, the carrier is liable only as bailee until such orders and directions are given, or until he is informed to what place the goods are to be forwarded, and to whom delivered. The strict responsibility of a common carrier arises concurrently with the duty of immediate transportation; and this duty does not arise so long as anything remains to be done by the consignor before the goods can be intelligently started on the route to their destination—Barnes *v.* Eldridge, 100 Mass., 455; O'Neill *v.* N. Y., Cin. & H. R. R. Company, 60 N. Y., 138; Hutchinson on Carriers § 3282–'88. The same rule is applicable in the case of connecting carriers. The responsibility peculiar to the common carrier is not devolved on the next connecting carrier until the receiving carrier has delivered the goods to the former with directions for their shipment—the
388 place of destination and to whom consigned. Until this is done the relation of common carrier is not established between the shipper and the connecting carrier."

The facts in that case are quite similar to those in the cases under consideration. The East Alabama Railway Company received certain cotton and issued a bill of lading for through transportation from Gadsden, Alabama, to Mount Vernon switch, Maryland, over its own and connecting roads. The receiving carrier transported the cotton from Gadsden to Attalla, at which place the lines of the two companies connected; and the car containing the cotton was placed upon a side track of defendant, the East Alabama Railway Company having no side track at that point. No notice was given defendant's agent at Attalla that the cotton was placed on a side track for through shipment, nor was there any name or address of the consignee, nor any waybill or shipping directions sent with the cotton, or to the agent of defendant, until after the cotton was burned, which occurred during the night of the third day after its arrival at Attalla. It was held that there had been no delivery and that the liability of insurer had not been assumed by the defendant company. See also Reynolds *v.* Boston & Albany Railroad Company, 121 Mass., 291; McDonald *v.* The Western Railroad Corporation, 34 N. Y., 597; Condon *v.* Marquette, Houghton & Ontonagon Railroad Company, 55 Mich., 218; Conkey *v.* The Milwaukee & St. Paul Railway Company, 31 Wis., 619. The result of this rule is that before a delivery can be deemed completed the succeeding carrier must be invested by the preceding carrier with the possession and exclusive control of the property and that for immediate transportation. The liability of the succeeding carrier commences only when that of the preceding carrier has terminated. A delivery is not consummated by merely placing the car upon the tracks of the succeeding carrier, for such carrier is not by that act informed of the destination of the car and cannot therefore give it immediate transportation. The delivery of a bill of lading or way-

bill without delivery of possession would confer, at most, only a right to ultimate possession, California Insurance Company *v.* Union Compress Company, 133 U. S., 387–415, and would not impose upon the succeeding carrier the liability of an insurer until delivery of actual and exclusive possession and control. St. Louis, Iron Mountain & Southern Railway Company *v.* Knight, 122 U. S., 79, 93; St. Louis, Iron Mountain & Southern Railway Company *v.* Commercial Union Insurance Company, 139 U. S., 223; Missouri Pacific Railway *v.* McFadden, 154 U. S., 155, 160. So, also, the mere physical possession without shipping directions would not impose
389 such liability (although the company might be liable for the goods as bailee) because the goods must be delivered into the carrier's exclusive possession and control for immediate transportation and the duty of immediate transportation could not arise until the delivery of proper shipping directions. There must concur the possession and exclusive control and the necessary directions essential to immediate transportation before the character of insurer can attach to the connecting carrier. Until these conditions have been performed by the delivering carrier he is not absolved from liability as insurer. In the cases before us it appears that the appellant was without yard facilities or switching engines at the end of his line at East St. Louis. Under contract with the Terminal Association the latter undertook for a consideration stated to furnish him with yard facilities and with switch-engines to break up his incoming trains and to place his cars upon certain designated tracks belonging to the Terminal Association, there to await further directions with respect to their destination. The Terminal Association had no means of knowing the destination of the cars until such further directions were given. This was accomplished by means of the delivery of the waybills stating the name of the consignee and the place of destination. In doing this work of switching and placing the cars the Terminal Association acted as the agent of and for and in behalf of the receiver. While the cars so stood upon the designated tracks they were in the possession of and under the control of the receiver and not of the Terminal Association. A completed delivery could only be made, according to the usual course of business between the two lines, by the delivery of a waybill indicating the destination of the goods, the amount of advance charges and the name of the consignee, and taking receipts for them; then, and not until then, was the Terminal Association invested with the possession and exclusive control of these goods; then, and not until then, was the duty of immediate transportation imposed. This was the uniform course of business between the connecting carriers concerning which there is no disputation in the evidence; fortified by the fact that the receiver's company, accustomed to make daily reports to other companies of delivery of their cars to connecting carriers, did not report such cars as delivered until waybills had been given to the Terminal Association and its receipts taken for the cars. The initial placing of the cars by the Terminal Association upon its tracks under its contract with the receiver's company was merely the act of an agent performing for the principal a duty de-

volving upon him and which he was unable to perform except
390 in that way. It was the act of the receiver by his agent and was not a delivery of the car for transportation to a succeeding carrier.

As I read the case of Pratt *v.* The Grand Trunk Railway Company, 95 U. S., 43, the facts being considered, it is in full accord with the position here assumed. Without doubt the custom of business established between two connecting carriers may largely control in the application of the rule, since such custom may determine the agreement of the carriers with respect to acts which shall constitute a delivery. In that case, as not here, the goods were placed within the exclusive control of the succeeding carrier. There the presence of the goods in the precise locality agreed upon for the deposit of goods for transportation over the lines of the succeeding carrier with the address of the consignees upon them sufficiently indicated that they were for transportation over its line of railway; not so here, for the cars were placed upon tracks set apart for the accommodation of the receiver and the Terminal Association was without knowledge of consignee or destination of the cars, or whether they were to be transported over its line at all. There the goods were deposited by the one party and received by the other for transportation; not so here, because the car was placed by the Terminal Association under its contract for the accommodation of the receiver and, without further direction, it was not possible for the Terminal Association to know whether the car was for transportation at all over its lines, or whether it should be transferred to the Wiggins Ferry Company. There, by the custom of business, it was the duty of the succeeding carrier with respect to goods deposited in the particular place for transportation to call upon the preceding carrier for waybills; not so here, for the duty of delivering a waybill was cast upon the receiver. There the liability as insurer was denied because the goods had been delivered to the succeeding carrier for proper carriage.

I am of opinion that the like rule should be applied with respect to the car-loads of barley consigned to parties in the city of St. Louis, unless the liability of insurer had been interrupted by some act of the consignor or consignee. It will be observed that the transit of the barley was not ended upon the arrival of the cars at the end of the receiver's line of road at East St. Louis. It was still to be transported over other and connecting lines to its destination. The barley was still *in transitu*. The record discloses that it was the custom of the receiver with respect to goods consigned to the city of St. Louis upon their arrival at East St. Louis to give immediate notice to consignees and take their directions to
what part of the city of St. Louis the goods should be for-
391 warded and by what line, whether by the lines of the Terminal Association or by the lines of the Wiggins Ferry Company, two rival companies whose lines of railway connected with the road of the receiver. The master's report in the principal case states "that no notice was sent to the owner, shipper or consignee of the arrival of said cars at St. Louis, or of the delivery of them to

the Terminal railroad." The appellant has cast upon him the burden of showing that he has fulfilled his contract of carriage; that upon the arrival of goods, according to the custom of business, he had notified the consignees and taken their directions with reference to the further carriage of the goods. It is not shown that this notice was given and the master reports that it was not. This phase of the case, however, need not be dwelt upon for, assuming that notice had been given and no instructions received within a reasonable time, the liability of the receiver as a common carrier was discharged, but liability as warehouseman was assumed. The goods were still in his custody and under his control. They had not been delivered to the Terminal Association for further carriage or for any other purpose. The cars were placed upon the tracks designated as the yard tracks of the receiver and were there for his accommodation. The Terminal Association had no control over them. It was not advised of the destination of those cars, or of the consignees. Until such advice it could not rightfully take possession of them, nor rightfully transport them, nor safely deliver them. They might be for transportation over the Wiggins Ferry Company, its rival, and the Terminal Association was bound by its contract with the receiver to furnish switch-engines for the transportation of those cars and their delivery to the Wiggins Ferry Company when so ordered. If in the case supposed the receiver held them merely as warehouseman, he is still liable, for his answer asserts that the cars were placed in close proximity to a "veritable fire-trap;" so that, whether the receiver is to be regarded with respect to his obligation as insurer or as warehouseman of these goods and these cars, he is liable for their destruction.

It is held by the presiding judge that by reason of a certain supposed agreement between consignees in St. Louis and the Terminal Association—to the effect that the latter, as an inducement to barley dealers to ship over its lines, would hold cars containing shipments to such consignees on the tracks of the Terminal Association at East St. Louis—the receiver was absolved, and liability under such agreement imposed upon the Terminal Association so soon as these cars had under the contract with the receiver been placed
392 upon the tracks designated for the accommodation of the receiver's cars. I am unable to concur in this conclusion. I have sought to show that there had been no delivery of these cars to the Terminal Association. It had not knowledge of their destination. It had not knowledge of the consignees of them. They were subject to the direction and control of the receiver. The Terminal Association under its contract with the receiver had placed these cars upon these tracks for the receiver and for a compensation agreed upon. It therein was the agent of the receiver. It could not know whether these cars were to be transported over its line or the lines of the Wiggins Ferry Company; it could not know in what direction they were to be transported or their ultimate destination. When it had placed the cars on these tracks pursuant to its contract with the receiver it had nothing further to do with them until the receiver had dispossessed himself of possession and

control and had invested the Terminal Association therewith. I cannot comprehend that the general agreement between the Terminal Association and consignees can become operative with respect to the contents of these cars until delivery to the Terminal Association and it had been invested with the exclusive possession and the exclusive control of them. The force of the reasoning is not perceived whereby it is held that because in fact these goods were ultimately to go to persons who had contracted with the Terminal Association—of which contract the receiver had no knowledge—therefore these goods were held under that contract before delivery in fact to the Terminal Association and before it was invested with exclusive control of them. I do not undertake to say that the Terminal Association may not be liable to the receiver for its negligent acts causing the fire whereby this property was destroyed. Neither the question nor the party is before us. The question here is whether the receiver is absolved from liability; whether, failing a delivery of the cars to the Terminal Association, failing a surrender by the receiver of control over them, with ignorance upon the part of the Terminal Association of their destination or their consignees, the agreement between the Terminal Association and the consignee had become operative with respect to these goods. I think not. If the receiver had directed that the Terminal Association under its contract with him should transfer these goods to the Wiggins Ferry Company, his order must have received recognition and have been carried out by the Terminal Association; and it cannot be doubted that up to the time of the fire in question the goods were so subject to the receiver's direction and control. For these reasons I think that the decrees appealed from should be affirmed.

393 SHOWALTER, *Circuit Judge:*

The failure of appellant touching any obligation on his part to give proper shipping directions to the connecting carrier is not set up as a ground of action in any one of the petitions. The cause of action alleged in each is that he was a common carrier and that the property therein specified, which was negligently or accidentally destroyed by fire, was at the time of such destruction still in his possession as bailee for carriage. Counsel for appellees say:

"The pleadings raise a single issue: Were the cars and their contents, at the time they were destroyed, in the possession of appellant as receiver of the Chicago, Peoria and St. Louis Railroad Company, or had they been delivered by him to the next succeeding carrier, the Terminal Railroad Association of St. Louis? Appellees claim that the cars and their contents had not been delivered to the Terminal Railroad Association at the time of the fire, but were in the possession of appellant, while appellant contends that he had made a delivery of them, and, therefore, is not responsible for the loss and damage which the fire caused. The sole question for decision, therefore, is, had there been a delivery of the cars and their contents by appellant to the Terminal Railroad Association at the time of the fire?"

Referring to all the cars in question other than the one mentioned next below in this opinion, they say further:

"These cars and their contents having been consigned to St. Louis, a point beyond the end of the receiver's route, the duty of the receiver was, when he received them into his possession at Peoria, to carry them safely to East St. Louis, the end of his road, and there deliver them to the Terminal Association, the next succeeding carrier. The obligation to safely deliver these cars and their contents to the Terminal Association was just as imperative as the obligation to carry them safely, and until he made such a delivery, he held this property as a carrier."

On October 20, 1894, the Carr, Rider & Engler Company, a corporation of Dubuque, Ia., delivered to the Chicago, Milwaukee & St. Paul Railway Company, a quantity of doors, sashes and blinds loaded in a car numbered 1004 which belonged to the Rock Island & Peoria Railway Company. This freight was consigned by
394 way of East St. Louis to May & Thomas Hardware Company, Birmingham, Ala. The Chicago, Milwaukee & St. Paul Railway Company hauled this car to Rock Island, Ill., and there delivered it to the Rock Island & Peoria Railway Company. This latter company hauled the car to Peoria and there delivered it to the Peoria and Pekin Union Railway Company. By this latter company the car was taken to Pekin, Ill., and there delivered to this appellant receiver, operating the road of the Chicago, Peoria & St. Louis Railway Company, who hauled the same to a point immediately beyond the terminus of his own rails at East St. Louis and on the rails of the Terminal Railroad Association of St. Louis, reaching that point about three o'clock on the afternoon of October 28, 1894. Servants of the Terminal Railroad Association of St. Louis, in the usual course of their employment by that company then hauled the car to a certain customary halting place on the premises of their employer, using for the purpose an engine which belonged to their employer. Here they left said car stationary till the evening of that day when it was destroyed by fire. In the usual course of business the Terminal Association, after obtaining from the receiver a waybill or memorandum indicating the ultimate destination of said car, would have hauled the same over its own rails in East St. Louis, or over rails subject to its control for that purpose, and delivered the same to a carrier on whose line the transit south was to continue.

When the initial carrier, the Chicago, Milwaukee & St. Paul Railway Company, received this car it gave a receipt to the shipper containing certain terms and conditions expressly applicable to the transit over its own line. Each intermediate and connecting carrier took the car not by virtue of any express contract with the shipper or consignee, but of its legal obligation as a carrier to accept and carry and safely deliver at the end of its line to the next succeeding carrier. The appellant here is not liable for the loss of the car by any express contract with the shipper or consignee. From the standpoint of the shipper or consignee of car 1004 the Terminal Association was a connecting carrier to haul the car from the ter-

minus of appellant's rails to the point in or near East St. Louis whence the next succeeding carrier would take it south. Appellant was bound for the safety of the car until it went into the care of the Terminal Association. Appellant was also required to indicate to the Terminal Association the destination and, possibly, the route selected south from East St. Louis. This information would be given by means of a memorandum called a waybill. The strong contention by appellees is that because no waybill was ten-
395 dered by appellant to the Terminal Association before the destruction of the car, appellant must be deemed in possession at the time of the loss; in other words, that the Terminal Association could not be treated as in possession until it had received the waybill.

The Terminal Association, as said, in fact took and at the time of the loss had the custody and care of the property. So far as appears the haul over its tracks from the point where appellant's servants parted from the car to the point where the loss occurred was a portion of the transit to be made in any case, no matter what the ultimate destination of the car might be. For the purpose of moving the car thus far the information as to the ultimate destination which a waybill would have given was not needed. It does not appear that the lack of such information contributed in any way to the loss. It does appear that in the peculiar carrying business conducted by the Terminal Association, the car in question would remain for a time stationary and thereafter be hauled, probably with other cars grouped for the purpose, to the starting place of the carrier who was to take it south. Information as to the ultimate destination and route had not, as yet, been actually imparted by appellant to the Terminal Association. But the latter was content for the time being to treat such information then in the possession of appellant as sufficiently available to itself.

The theory that appellant remained constructively bailee for carriage, it is fair to say, is urged in connection with a document showing certain contract relations between appellant and the Terminal Association. The first, fourth and fifth sections of that document have been quoted in the opinion of the presiding circuit judge. The preamble is in words following:

"Whereas, the party of the first part undertakes to give the party of the second part terminal facilities at East St. Louis, Illinois, for the handling of its trains, care of its engines and cars, and the handling and care of its freight, under the following terms and conditions," etc.

The second and third sections and the last paragraph, being the remainder of the contract in question, are quoted below:

"Second. Cars made 'bad order' by and during the making up and breaking up of trains of the party of the second part to be repaired by the party of the second part, and the party of the second part shall furnish its own car inspectors.

"All cars made 'bad order' outside of the yards set aside for the use of the party of the second part shall be repaired by the party causing the damage.

"Third. For all loads to and from the National stock
396 yards, the party of the second part is to pay the party of the first part one (1) dollar per car in and out, inclusive of the charge for making up and breaking up of trains, but not the trackage charge at National stock yards.

"This contract to be in force from and after the 1st day of August, 1892, and to continue for six months from that date, and to be renewed from time to time, as desired, at the expiration thereof, if satisfactory to both parties."

No yards, nor any special place or territory in any yards were "set aside" by the Terminal Association "for the use of" the receiver in the sense that he exercised any dominion over, or had any possessory right to the same. The servants of the Terminal Association may have been accustomed to haul cars from the receiver's road to some special territory in the yards of the Terminal Association and that territory may for the time being have been "the yards set aside for the use of" the receiver within the sense of the second section of the contract. But said servants did not do this by any direction from the receiver; nor was any right in him to direct or control them, or to designate the place on the grounds or rails of the Terminal Association where any car received from his road should be at any given time, in any way recognized. This was the construction given to the contract and acted on by the parties. The document in question is not a conveyance. I do not find in it any transfer of any estate in its grounds or tracks, or any part thereof, or of any possessory interest in its engines, orcontrol over its servants, from the Terminal Association to the receiver. That the receiver had no such interest or estate is more obvious here than that in Pratt *v.* Railway Company cited below, the Grand Trunk Railway Company had no proprietorship of any kind over any part of the station-house of the Michigan Central Railway Company. The fifth paragraph of the contract apparently licenses the receiver to enter the premises of the Terminal Association to look after such of his engines as may be there for the time being. But the receiver had no possessory estate of any sort in any part of the property of the Terminal Association.

A shipper who sends freight over a given line of road, whether operated by a single carrier or by independent and connecting carriers, has the right to needful terminal facilities for unloading his goods. In paying the freight charge he pays for such facilities if in his case they are needed. But what carrier provides them is from his standpoint an immaterial matter. If the goods are carried to the neighborhood of the place of destination by one carrier and the terminal facilities made use of there to haul the goods
397 from the terminus of such carrier's rails to the place of destination or to a new starting place for further transit, are provided by another, the freight charge to the shipper will be the same for the two as if both the road of the first carrier and the property, rails, fixtures and equipment of the second belonged to a single carrier. Assuming that the rails of this receiver terminated at a point in East St. Louis, but that at this point they connected with

the rails of the Terminal Association, and that the latter company owned or possessed terminal facilities and a system of what may be called intramural roads by which it hauled cars to points in St. Louis and to the termini in and about St. Louis or East St. Louis of the roads of various other carriers leading from these cities in different directions, and that the Terminal Association was in the business of receiving and hauling freight over its line to other lines and to various points of ultimate destination in the neighborhood—then the Terminal Association would be a connecting carrier and would be subject to all rules of law governing that business. The case of Walker *v.* Keenan, 34 U. S. App., 691, concerned the matter of terminal facilities. Counsel for the defeated party in that case made application to the Supreme Court of the United States for a writ of certiorari. The sole matter of controversy was the true meaning and significance of the Covington Stock Yards case here called to our attention by appellees' counsel and referred to below in this opinion. The certiorari was denied. 164 U. S., 706.

A contract between this appellant and the Terminal Association regulating the charges which the Terminal Association might receive for the business done by it on its own road is nothing more than a division of the freight charge between the two connecting carriers. As said above the shipper pays no more than if the appellant had himself owned and operated the lines of the Terminal Association. Such a contract could not interfere with or modify the legal obligation of either carrier to a shipper whose goods are handled successively by both. Neither appellant nor the Terminal Association could evade or alter any legal obligation to a third party by any contract between themselves. If the Terminal Association had alienated to appellant an actual ownership or possessory right over that portion of its tracks where the cars in controversy were destroyed, and such a control over its employés and engines that said employés when engaged in handling the cars in question were the servants of appellant and the engine used by them his engine for the time being, the case would be different. On this hypothesis the tracks where the cars were destroyed would have been appellant's tracks, the employés who hauled the
398 cars to that point his servants, the engines used by them his engines, he would have continued to be the bailee of the property, and the matter of waybills or junction reports would have signified nothing. But in my judgment, as said, the contract in question had no force as of alienation by the Terminal Association to appellant of any possessory right, interest or estate in or over any property of the former company, or of any control over its servants. Neither the relation of lessor and lessee, nor that of licensor and licensee, existed between these parties as resulting from said contract so far as it concerned the cars and contents in question.

In the Covington Stock Yards case, 139 U. S., 128, it was ruled, in effect, that a carrier bringing cattle to a consignee who had provided himself with structures connecting his yards with the railroad track whereby cattle might be unloaded directly from the cars into his yards, could not refuse to unload the cattle of such consignee

into the yards and by means of the appliances provided by him for the mere purpose of compelling him to pay a terminal fee at the cattle yards provided by the company, or provided by an independent corporation. This case, as I conceive, has not here the application and significance suggested by counsel for appellees. Of the cars in question one was to go to Birmingham, Alabama, the others, loaded with barley, to different points in and about St. Louis as directed by the consignees. Appellant did not engage to furnish unloading facilities for these cars. He was under no obligation to these appellees to provide terminal facilities for unloading. He handled the cars and freight as an entirety.

So far as concerns any one of the cars here in question, when the Terminal Association took possession the appellant as a carrier or bailee no longer had any control. No one of these cars would again come into his custody unless the owner of such car, or of the property therein contained, should see fit to reship the same back over his road. Appellant had brought the cars in controversy safely to the end of his line and the Terminal Association had hauled them over its tracks to the place of loss. Appellant had ceased to be bailee of these cars, or any of them, and the Terminal Association had become such bailee. The Terminal Association had voluntarily accepted all these cars from appellant knowing them to be, at the time of such acceptance, in transit. They were upon the tracks of that company and would be moved thereafter by that company, by its servants using its engines and over its tracks or over tracks under its control for that purpose. It matters not that the information upon which the latter company would act in the further
399 transit of car 1004 was still to come from appellant, or that the information touching the different points in St. Louis where the cars of barley were wanted by the consignees, might also come through appellant.

Ultimate shipping directions as between appellant and the Terminal Association were regulated by an understood course of dealing between them. Such a car, for instance, as 1004 would, in any case and by reason of the peculiar character of the carrying business conducted by the Terminal Association, remain for a time stationary on its premises. It mattered not whether the ultimate shipping directions were contemporaneous with the delivery, or some hours later. Following the custom which had prevailed between the two carriers, appellant had not, at the time of the loss sent the ultimate shipping directions. But for the destruction of this car appellant would have given the shipping directions within ample time to suit the convenience of the Terminal Association in moving the car on to the starting place of the next succeeding carrier. Such shipping directions as appellant was able to give concerning any of these cars, were at all times available to the Terminal Association. Concerning some of the cars consigned to parties in St. Louis the evidence seems to show, that, by arrangement between the consignees and the Terminal Association, the place on the premises of the company where the loss occurred might be or might become the place of final destination.

As between an intermediate and a connecting carrier that one, I take it, which was in fact bailee of the goods when the loss occurred is answerable to the owner. He is not required to work out theories of constructive possession, or of constructive non-delivery resting on some understanding or mode of dealing between the two which he might have difficulty in finding out or proving. But the method or course of dealing whereby an intermediate carrier conveys shipping directions to a connecting carrier is a different matter. It is due to the owner that such directions be given so that his goods may go on and without needless delay. If this requirement be answered I do not see how the owner is concerned with the method or custom of dealing on that matter which the two carriers find convenient.

As between the owner or shipper and the initial carrier goods are not in transit until the destination has been made known so that the transit may commence. But when goods are once in transit then, barring exceptional circumstances not necessary to the discussion, they remain in transit until the final destination is reached, and some one carrier in the line of connecting carriers is always subject to the obligations of a bailee for carriage. A con-
400 necting carrier may receive and load into his own cars goods which he knows are to be carried by him, and thereafter take from the preceding carrier the shipping directions. He may even carry such goods to a specified point on his own road to which he knows they must be carried in any event and there receive the shipping directions. If he be content with such a course of dealing between himself and the previous carrier on the matter of shipping directions, I do not see why he did not become bailee for carriage when he received the goods, why the delivery by the preceding carrier was not then complete, or how the owner could sustain any hurt from such method of dealing between the two carriers?

In Pratt *v.* The Grand Trunk Railway Company, 95 U. S., 43, the goods had been shipped from Liverpool to St. Louis. The packages were marked "P. & F., St. Louis." The goods were carried by the defendant from Montreal to Detroit and there they were destroyed by fire. On a state of facts as quoted in full below, delivery to the connecting carrier was predicated and the defendant held clear of liability:

"At the time the fire occurred, the defendant had no freight room or depot at Detroit, except a single apartment in the freight depot of the Michigan Central Railroad Company. Said depot was a building several hundred feet in length, and some three or four hundred feet in width, and was all under one roof. It was divided into sections or apartments, without any partition wall between them. There was a railway track in the center of the building, upon which cars were run into the building to be loaded with freight. The only use which defendant had of said section was for the deposit of all goods and property which came over its road, or was delivered for shipment over it. This section, in common with the rest of the building, was under the control and supervision of the Michigan Central Railroad Company, as hereinafter mentioned. The defendant employed in this section two men, who checked freight which

came into it. All freight which came into the section was handled exclusively by the employés of the Michigan Central Railroad Company, for which, as well as for the use of said section, said defendant paid said company a fixed compensation per hundredweight. Goods which came into the section from defendant's road, destined over the road of the Michigan Central Railroad Company, were, at the time of unloading from defendant's cars, deposited by said employés of the Michigan Central Railroad Company in a certain place in said section, from
401 which they were loaded into the cars of said latter company by said employés when they were ready to receive them; and, after they were so placed, the defendant's employés did not further handle said goods. Whenever the agent of the Michigan Central Railroad Company would see any goods deposited in the section of said freight building set apart for the use of the defendant, destined over the line of said Central railroad, he would call upon the agent of the defendant in said freight building, and, from a waybill exhibited to him by said agent, he would take a list of said goods, and would then, also, for the first time, learn their ultimate place of destination, together with the amount of freight charges due thereon; that from the information thus obtained from said waybill in the hands of the defendant's agent, a waybill would be made out by the Michigan Central Railroad Company for the transportation of said goods over its line of railway, and not before.

"These goods were, on the 17th of October, 1865, taken from the cars and deposited in the apartment of said building used as aforesaid by the defendant, in the place assigned as aforesaid for goods so destined.

"At the time the goods in question were forwarded from Montreal, in accordance with the usage in such cases, a waybill was then made out in duplicate, on which was entered a list of said goods, the names of the consignees, the place to which the goods were consigned, and the amount of charges against them from Liverpool to Detroit. One of these waybills was given to the conductor who had charge of the train containing the goods, and the other was forwarded to the agent of the defendant in Detroit. On arrival of the goods at Detroit the conductor delivered his copy of said waybill to the checking clerk of defendant in said section, from which said clerk checked said goods from the cars into said section. It was the practice of the Michigan Central Railroad Company, before forwarding such goods, to take from said waybill in the custody of said checking clerk, in the manner aforesaid, the place of destination and a list of said goods and the amount of accumulated charges, and to collect the same, together with its own charges, of the connecting carrier."

It will be seen from the foregoing statement that on the course of dealing between the two carriers shipping directions had not been received by the connecting carrier. The court mentions the
402 mark on the goods, but not as a controlling factor in the decision. The Michigan Central Railroad Company did not look at the marks on the goods for the shipping directions upon

which it acted. Under the mode of dealing between the two carriers the case was the same as though there had been no marks on the packages. The goods were on the platform of the connecting carrier at the time of the loss. The defendant did not own or have any possessory right over that portion of the connecting carrier's station-house. Defendant's servants were not privileged either to unload the goods there or to handle the goods afterwards. The servants of the connecting carrier placed all goods which were to be forwarded as designated by the agent of the defendant at a particular locality on the platform in question. The defendant ceased to be and the connecting carrier became the bailee of the goods—and this before the shipping directions had been given by the one carrier to the other according to the understood mode of dealing between them. This was a case in which the defendant did not own or possess the unloading platform. If the defendant had owned or possessed that section of the station where the goods were unloaded, the mere placing the goods in controversy at a particular locality on the platform from which the servants of the connecting carrier would afterwards without special license from the defendant take them, would not have changed the custody of such goods. The law upon this point is clear. Nor would the connecting carrier have become bailee even if its agent had received the shipping directions before the destruction of the goods. The fact that the goods were still in the custody of the defendant would from the standpoint of the shipper have determined the matter. I may add that the Grand Trunk Railway Company had no terminal, that is to say unloading, facilities at Detroit so far as concerned the owner of the goods in question. The section of the station in which the freight of the Grand Trunk Railway Company was unloaded, was owned and possessed by the connecting carrier. In the case at bar the connecting carrier not only took exclusive possession of the cars in controversy at the terminus of appellant's rails but hauled them to a point on its own rails to which appellant had, neither in law nor by contract, even a right of access.

In Conkey v. The Milwaukee & St. Paul Railway Company, 31 Wis., 619, the defendant carried goods marked with the name of the consignee and with the place of destination, "Preston, Minn., via La Crosse & Lanesboro," from Milwaukee to La Crosse and there unloaded the same into its own station or freight-house. From the latter point the goods were to be taken by the connecting
403 carrier, the Southern Minnesota Railroad Company. These goods were deposited upon a certain portion of defendant's premises from which, according to the course of business between the two carriers, the connecting carrier would take them without further notice or request. So far as appeared the connecting carrier, knowing that the goods so placed were for transit over its road, looked only to the marks on such goods for further shipping directions. The connecting carrier failed to remove the goods in question and they were destroyed by fire. The court ruled that defendant was still the bailee for carriage and so answerable to the owner for the loss. In this case there was no lack of shipping direc-

tions, and on the course of dealing between the two carriers the defendant would not again have handled the goods. But they were still on defendant's premises; the custody or possession in fact had not passed to the connecting carrier.

In Mount Vernon Company *v.* Ala. Gt. Southern Railroad Company, 92 Ala., 296, the place of junction between the connecting carriers was Attalla. The car in question was laden with cotton brought to Attalla over defendant's road and there placed by defendant's servants on a side track belonging to the connecting carrier whence the latter was expected to move it on towards the place of ultimate destination. No notice of this was given to the connecting carrier and the car while so placed was destroyed by fire. Defendant undertook unsuccessfully to prove that by a course of dealing between itself and the connecting carrier, the latter was accustomed to receive on said side track and haul over its rails to the Chattanooga Compress cars laden with cotton and there await the waybill or ultimate shipping directions. The court was evidently of opinion that if the car in question had been so taken and hauled to the Chattanooga Compress it would have been delivered, but suggested that such a course of dealing would have been tantamount to a shipping direction to the connecting carrier to haul the car as far, at least, as the Chattanooga Compress. So in the case at bar the Terminal Association knew that each of the cars in controversy was to be hauled over its own rails in any case as far as to the place of loss. For that much of the transit over the rails of the Terminal Association no special shipping directions were needed; and whether that company received, before or after the haul to the place of loss, the waybill indicating the ultimate destination of the car, was, on its peculiar method of business, and course of dealing with appellant, an immaterial matter.

From the ruling of this court that appellant must be held
404 for the loss of the car numbered 1004 consigned to Birmingham I dissent. I concur in the conclusion that the decree against appellant as to the barley and the destroyed cars be reversed.

It is ordered by the court that the decree in case 454 be affirmed, and that the decrees in the other cases numbered 442, 452 and 453 in favor, respectively, of the Chicago, Milwaukee & St. Paul Railway Company, Jacob Rau and the Huntting Elevator Company, be reversed and the causes remanded with direction in each case to dismiss the petition.

405 And afterwards, on the same day, to wit: on the twenty-fifth day of February, 1898, in the October term last aforesaid, the following further proceedings were had and entered of record, to wit:

Decree. Entered Feb. 25, 1898.

FRIDAY, *February* 25, 1898.

Before Hon. William A. Woods, circuit judge; Hon. James G. Jenkins, circuit judge; Hon. John W. Showalter, circuit judge.

MERCANTILE TRUST COMPANY
vs.
CHICAGO, PEORIA & ST. LOUIS RAILWAY COMPANY ET AL. } 452.

In the matter of the intervening petition of Jacob Rau.

C. H. BOSWORTH, Receiver, etc.,
vs.
JACOB RAU.

Appeal from the circuit court of the United States for the southern district of Illinois.

This cause came on to be heard on the transcript of the record from the circuit court of the United States for the southern district of Illinois and was argued by counsel.

On consideration whereof, it is now here ordered, adjudged and decreed, by this court, that the decree of the said circuit court, in this cause, be, and the same is hereby reversed, with costs; and that this cause be, and the same is hereby remanded to the said circuit court with directions to dismiss the petition.

406 And afterwards, to wit, on the second day of March, 1898, in the October term last aforesaid, the following further proceedings were had and entered of record, to wit:

Order of March 2, 1898.

WEDNESDAY, *March* 2, 1898.

Before Hon. William A. Woods, circuit judge; Hon. James G. Jenkins, circuit judge; Hon. John W. Showalter, circuit judge.

MERCANTILE TRUST COMPANY
vs.
CHICAGO, PEORIA AND ST. LOUIS RAILWAY COMPANY. } 452.

In the matter of the intervening petition of Jacob Rau.

Upon application of counsel for appellee, it is now here ordered that mandate in this cause do not issue in accordance with the provisions of rule 27 of this court, but that the same be and is hereby stayed, until further order of this court.

407 And afterwards, to wit: on the twenty-second day of March, 1898, in the October term last aforesaid, came the appellee,

by his counsel, Mr. George R. Peck, Mr. Burton Hanson and Mr. George P. Cary, and filed in the clerk's office of said court his petition for rehearing, which said petition was in the words and figures following, to wit:

Petition for Rehearing. Filed March 22, 1898.

In the United States Circuit Court of Appeals for the Seventh Circuit, October Term, A. D. 1897.

THE MERCANTILE TRUST COMPANY, Complainant,
vs.
CHICAGO, PEORIA & ST. LOUIS RAILWAY COMPANY ET AL., Defendants.

In the matter of the intervening petitions of the Chicago, Milwaukee & St. Paul Railway Company, the Huntting Elevator Company, and Jacob Rau.

C. H. BOSWORTH, Receiver, Appellant,
vs.
CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, Appellee. } No. 442.

C. H. BOSWORTH, Receiver, Appellant,
vs.
JACOB RAU, Appellee. } No. 452.

C. H. BOSWORTH, Receiver, Appellant,
vs.
THE HUNTTING ELEVATOR COMPANY, Appellee. } No. 453.

Petition for rehearing.

And now comes The Chicago, Milwaukee & St. Paul Railway Company, The Huntting Elevator Company and Jacob Rau,
408 appellees and intervenors above named, and pray the court to grant a rehearing in these causes for the reasons stated in the brief and argument appended to this petition.

GEO. R. PECK,
BURTON HANSON,
GEORGE P. CARY,
Counsel for Appellees.

And afterwards, to wit: on the first day of April, 1898, in the October term last aforesaid, the following further proceedings were had and entered of record, to wit:

Petition for Rehearing Overruled, April 1, 1898.

MONDAY, *April* 1, 1898.

Before Hon. William A. Woods, circuit judge; Hon. James G. Jenkins, circuit judge; Hon. John W. Showalter, circuit judge.

C. H. BOSWORTH, Receiver,
vs.
JACOB RAU, Intervenor. } 452.

Appeal from the circuit court of the United States for the southern district of Illinois.

It is ordered by the court that petition for rehearing in this cause be, and the same is hereby overruled.

409 *Certificate of Clerk.*

United States Circuit Court of Appeals for the Seventh Circuit.

I, Oliver T. Morton, clerk of the United States circuit court of appeals for the seventh circuit, do hereby certify that the foregoing printed pages, numbered from 1 to 408, inclusive, contain a true copy of the transcript of record and proceedings in the United States circuit court of appeals for the seventh circuit in the case of Mercantile Trust Company *vs.* Chicago, Peoria and St. Louis Railway Company, in the matter of the intervening petition of Jacob Rau,— C. H. Bosworth, receiver, appellant, *vs.* Jacob Rau, appellee, No. 452, October term, 1897, as the same remains upon the files and records of said United States circuit court of appeals for the seventh circuit.

In testimony whereof I hereunto subscribe my name and affix the seal of said United States circuit court of appeals for the seventh circuit, at the city of Chicago, this 16th day of April, A. D. 1898.

[SEAL.] OLIVER T. MORTON,
Clerk of the United States Circuit Court of Appeals for the Seventh Circuit.

410 United States Circuit Court of Appeals for the Seventh Circuit.

I, Oliver T. Morton, clerk of the United States circuit court of appeals for the seventh circuit, do hereby certify that the foregoing printed pages, numbered from 1 to 409, inclusive, contain a true copy of the transcript of the record and proceedings in the United States circuit court of appeals for the seventh circuit, in the case of Mercantile Trust Company *vs.* Chicago, Peoria & St. Louis Railway Company, in the matter of the intervening petition of Jacob Rau,— C. H. Bosworth, receiver, appellant, *vs.* Jacob Rau, appellee, No. 452, October term, 1897, as the same remains upon the files and records of said United States circuit court of appeals for the seventh circuit.

Seal United States Circuit Court of Appeals, Seventh Circuit.

In testimony whereof I hereunto subscribe my name and affix the seal of the United States circuit court of appeals for the seventh circuit, at the city of Chicago, this 18th day of April, A. D. 1898.

OLIVER T. MORTON,
Clerk of the United States Circuit Court of Appeals for the Seventh Circuit.

411 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable the judges of the United States circuit court of appeals for the seventh circuit, Greeting:

[Seal of the Supreme Court of the United States.]

Being informed that there is now pending before you a suit in which C. H. Bosworth, as receiver of the Chicago, Peoria & St. Louis Railway Company, and The Chicago, Peoria & St. Louis Railway Company are appellants and Jacob Rau is appellee, No. 452, which suit was removed into the said circuit court of appeals by virtue of an appeal from the circuit court of the United States for the southern district of Illinois, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said circuit court of appeals and removed into
412 the Supreme Court of the United States, do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the tenth day of May, in the year of our Lord one thousand eight hundred and ninety-eight.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

413 UNITED STATES OF AMERICA, *Seventh Circuit,* } *ss:*

In obedience to the command of the foregoing writ of certiorari, and in pursuance of the stipulation of the parties, a full and true copy of which is hereto attached, I do hereby certify and return that the transcript of the record filed with the application to the Supreme Court of the United States for a writ of certiorari in the case of C. H. Bosworth, receiver of the Chicago, Peoria & St. Louis Railway Company, and The Chicago, Peoria & St. Louis Railway Company, appellants, and Jacob Rau, appellee, is a full, true, and complete transcript of the record upon which said cause was heard in the United States circuit court of appeals for the seventh circuit, together with all proceedings in said court.

Seal United States Circuit Court of Appeals, Seventh Circuit.

In testimony whereof I hereunto subscribe my name and affix the seal of said United States circuit court of appeals for the seventh circuit, at the city of Chicago, this 18th day of May, A. D. 1898.

OLIVER T. MORTON,
Clerk United States Circuit Court of Appeals for the Seventh Circuit.

414 [Endorsed:] Case No. 16,858. Supreme Court of the United States. No. 285, October term, 1898. Jacob Rau *vs.* C. H. Bosworth, rec'r, &c. Writ of certiorari & return. Filed May 18, 1898. Oliver T. Morton, clerk. Office Supreme Court U. S. Filed May 26, 1898. James H. McKenney, clerk.

415 In the United States Circuit Court of Appeals for the Seventh Circuit, October Term, A. D. 1897.

MERCANTILE TRUST COMPANY
vs.
CHICAGO, PEORIA & ST. LOUIS RAILWAY COMPANY ET AL.

In the matter of the intervening petition of Jacob Rau.

C. H. BOSWORTH, Receiver, etc., Appellant,
vs.
JACOB RAU, Appellee.

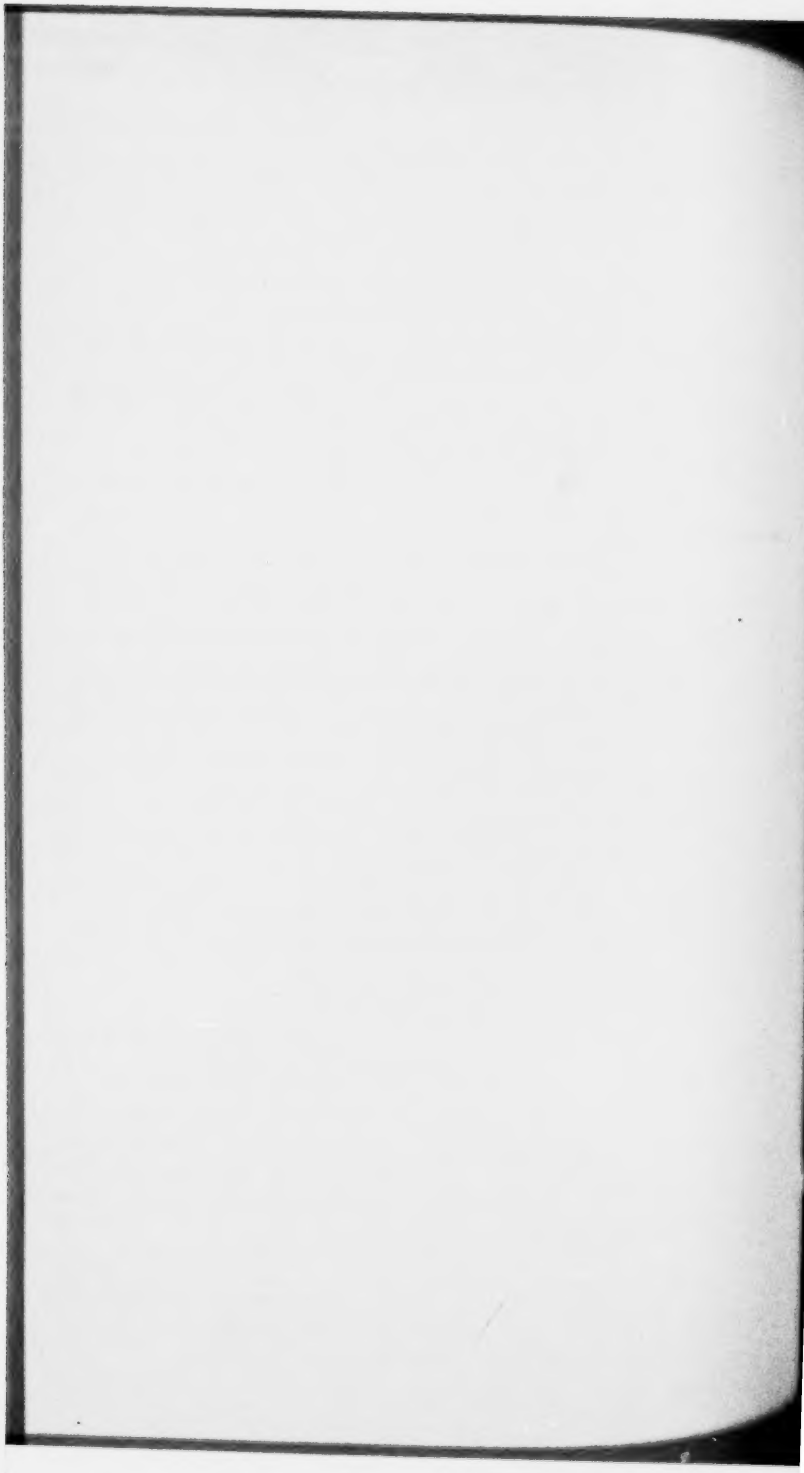
It is stipulated by and between the parties hereto by their respective counsel that the certified copy of the transcript of record filed by the clerk of this court in the Supreme Court of the United States in the application there made for a writ of certiorari in the above-entitled cause there entitled Jacob Rau *vs.* C. H. Bosworth, receiver, &c., No. 645, all to the October term, 1897, of said court, shall be taken as the return to said writ of certiorari granted by said Supreme Court in said cause on the 10th day of May, A. D. 1898.

Dated May 16, 1898.

GEO. R. PECK,
BURTON HANSON,
Solicitors for Jacob Rau.
BLUFORD WILSON,
PHILIP BA-TON WARREN,
Solicitors for C. H. Bosworth, Receiver.

Endorsed: United States circuit court of appeals, seventh circuit. Mercantile Trust Company *vs.* Chicago, Peoria & St. Louis Railway Company. In the matter of the intervening petition of Jacob Rau. C. H. Bosworth, receiver, etc., appellant, *vs.* Jacob Rau, appellee. Stipulation. Filed May 18, 1898. Oliver T. Morton, clerk.

Endorsed on cover: Case No. 16,858. U. S. C. C. of appeals, 7th circuit. Term No., 285. Jacob Rau, petitioner, *vs.* C. H. Bosworth, receiver of the Chicago, Peoria & St. Louis Railway Company, and The Chicago, Peoria & St. Louis Railway Company. Filed April 26, 1898.



13 604
845

FILED
APR 26 1898
JAMES H. McKENNEY
CLERK

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1897.

THE MERCANTILE TRUST COMPANY,
Complainant,
vs.
CHICAGO, PEORIA & ST. LOUIS RAILWAY COMPANY et al.,
Defendants.

In the matter of the Intervening Petitions of the Chicago, Milwaukee & St. Paul Railway Company, The Huntting Elevator Company and Jacob Rau.

Petition of the Chicago, Milwaukee & St. Paul Railway Company, The Huntting Elevator Company and Jacob Rau, for Writs of Certiorari, to the United States Circuit Court of Appeals for the Seventh Circuit

GEO. R. PECK,
BURTON HANSON,
COUNSEL FOR PETITIONERS.

The Gunthorp-Warren Printing Company, 53 Dearborn St., Chicago.

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1897.

CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, THE HUNTTING ELEVATOR COMPANY AND JACOB RAU,
Petitioners.

Petitions for Writs of Certiorari.

Petition for Writ of Certiorari requiring the United States Circuit Court of Appeals for the Seventh Circuit to certify to the Supreme Court for its review and determination the case of

C. H. BOSWORTH, RECEIVER, ET AL.,
Appellants,
vs.
CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY,
Appellee.

C. H. BOSWORTH, RECEIVER, ET AL.,
Appellants,
vs.
THE HUNTTING ELEVATOR COMPANY,
Appellee.

C. H. BOSWORTH, RECEIVER, ET AL.,
Appellants,
vs.
JACOB RAU,
Appellee.

which said appellees were intervenors in the suit of *Mercantile Trust Company* v. *The Chicago, Peoria and St. Louis Railway Company et al.*, which last mentioned

suit was brought in the Circuit Court of the United States for the Southern District of Illinois, to foreclose a certain mortgage or deed of trust given by said Chicago, Peoria and St. Louis Railway Company to said Mercantile Trust Company, in which suit said Bosworth was appointed Receiver of said Chicago, Peoria and St. Louis Railway.

To the Honorable Supreme Court of the United States:

The Chicago, Milwaukee and St. Paul Railway Company, the Huntting Elevator Company and Jacob Rau separately petition and show to this honorable court as follows:

First. That these cases involved the same question and were heard as one case before the Master, the Circuit Court and the Circuit Court of Appeals, and have from their inception been treated by the parties and the courts in which they have been pending as one case, and your petitioners have therefore united in making this petition, but it is presented to this court as the separate petition of each of said petitioners.

The question involved in these cases is this: Sixty cars loaded with barley consigned from points in Iowa, Minnesota and Wisconsin to St. Louis, Missouri, were destroyed by fire, while in transit, at East St. Louis, Illinois. The petitioners claim that they were in the possession of the Receiver at the time of the fire, while the Receiver contends that he had delivered them to the next connecting carrier, the Terminal Railroad Association of St. Louis, and that they were in the possession of that Association at the time the loss occurred. The question therefore is, what constitutes a delivery of property in car-load lots from one carrier to another, while in

course of transportation? By reason of the rule adopted by the Federal courts in

Myrick v. *R. R. Co.*, 107 U. S., 102,
R. R. Co. v. *Jones*, 155 U. S., 334,

that the carrier in whose possession property that is in course of transportation over several connecting lines is, at the time of loss or damage, is alone liable, unless the initial carrier, by a special through contract of carriage that is certain and definite in its terms, assumes such liability, this question becomes one of great gravity and importance, for it affects the interests of all persons who are compelled to ship their products over several connecting lines of carriers to get them to market, and who may be unable to make a special contract with the initial carrier that it will assume liability for all loss and damage to the property transported, whether occurring on its or any one of the lines of the several connecting carriers.

And while this court, in *Pratt* v. *Railway Company*, 95 U. S., 43, had occasion to pass upon the question of the delivery of *package freight* as between connecting carriers, it has never considered the question, What constitutes a delivery of freight in *car-load lots* when in course of transportation over several connecting lines of carriers? And by recurring to the opinions filed in these cases by each one of the Circuit judges it will be seen that there exists differences of opinion among said judges concerning what constitutes a delivery of freight in car-load from one carrier to another, as well as concerning the rule announced in the Pratt case when applied to the question of delivery as it arises in these cases.

These cases were instituted by the filing of intervening petitions in the aforesaid suit of the *Mercantile Trust Company* v. the *Chicago, Peoria & St. Louis Railway Com-*

pany to foreclose a mortgage or trust deed given by the railway company in which said Bosworth was appointed Receiver. The grounds of the petitions were that the cars and the barley they contained at the time they were destroyed by fire were in the possession of the Receiver, and that he negligently allowed them to stand or to be stored on tracks near by a long wooden warehouse that was filled with loose hay, through and into which locomotive engines were continually passing and repassing, which warehouse taking fire, was itself consumed, along with said cars and their contents. The Receiver denied that the cars were in his possession, and alleged that before the fire occurred he had delivered them and their contents to the next connecting carrier, the Terminal Railroad Association of St. Louis, and that they were in the possession of that Association at the time of the fire and that that Association negligently placed them alongside said wooden warehouse, which he characterized in his answer as "a vertible fire-trap." The matters in controversy were referred to the Honorable Stuart Brown, of Springfield, Illinois, the Master in chancery of that court, to take the testimony and report thereon to the court. The report of the Master being in favor of the intervenors, exceptions were filed thereto by the Receiver. The report and exceptions came before the Circuit Court, the Honorable William J. Allen, District Judge, presiding, for hearing, whereupon the exceptions were overruled and decrees entered in favor of the intervenors for the amounts reported by the Master, as follows:

Chicago, Milwaukee and St. Paul Railway Company	$9,033.73
S. Y. Hyde Elevator Company	2,154.53
Huntting Elevator Company	2,600.95

Thomas McMichael & Son	3,169.25
W. W. Cargill Company	1,253.23
Jacob Rau	1,144.07
Henry Rippe	1,165.67
Gilchrist & Co	805.00

Appeals were taken from the decrees entered in the cases of the Chicago, Milwaukee and St. Paul Railway Company, the Huntting Elevator Company and Jacob Rau. No appeals were taken in the other cases for the reason that it was stipulated that the decrees in those cases should abide the result of the appeals in the three cases above named. The appeals came on for argument before the United States Circuit Court of Appeals on the 25th day of October, 1897, and were held under advisement until the 25th day of February, 1898, when each one of the Circuit judges comprising said court handed down a written opinion, Circuit Judges Woods and Showalter holding that the decrees should be reversed and the intervening petitions dismissed, each basing his opinion upon reasons that were entirely different from the other, while Circuit Judge Jenkins filed a dissenting opinion fully sustaining the report of the Master in chancery as well as the decree of the Circuit Court. It therefore appears that the Master in chancery, the District judge who presided at the Circuit, and one of the Circuit judges sitting in the Court of Appeals held that the cars and their contents at the time they were destroyed by fire had not been delivered to the Terminal Association but were in the possession of the Receiver, and that he was liable therefor, while the two remaining Circuit Judges held that the Receiver had made a delivery of said cars and their contents to the next succeeding carrier, the Terminal Railroad Association of St. Louis, but based their opinions and conclusions upon entirely different reasons.

Second. Your petitioners show that it appears by the record of said causes in said Circuit Court of Appeals, a certified copy of which is herewith filed in this court and presented as a part of this application, in accordance with the rule of this court, that this litigation arises upon the following state of facts:

That the Chicago, Milwaukee and St. Paul Railway Company is a corporation organized and existing under and by virtue of the laws of the State of Wisconsin, and is a citizen of that state, and as such was a common carrier of freight from points in Iowa, Minnesota and Wisconsin, to Rock Island, one of its terminii in the State of Illinois, and that it was the owner of fifty-four of the sixty cars in which the barley in question was transported, that thirty-eight of said fifty-four cars, together with their contents, were totally destroyed at East St. Louis while in the possession of said Receiver, and that the value thereof as stipulated by the parties was $9,033.73, the remaining sixteen cars, which were partially destroyed, were repaired by the Receiver and returned to said railway company; that the Huntting Elevator Company, a corporation organized and existing under and by virtue of the laws of the State of Iowa, and a citizen of that state, Jacob Rau, a citizen of the State of Minnesota, James N. Gilchist and Colen F. Bell, citizens of said State of Iowa, engaged in business as partners under the firm name of Gilchrist & Co., at McGregor, in said state, Thomas C. McMichael and William McMichael, citizens of said State of Iowa, and engaged in business as partners under the firm name of McMichael & Son, at McGregor, in said state, the S. Y. Hyde Elevator Company, a corporation organized and existing under the laws of the State of Wisconsin, and a citizen of said state, and the W. W.

Cargill Company, a corporation organized and existing under the laws of the State of Wisconsin, and a citizen of that state, were engaged in the business of buying barley and shipping the same from various points in the States of Iowa, Minnesota and Wisconsin to St. Louis, Missouri; that their shipments of barley originated at stations on the line of railroad of the Chicago, Milwaukee and St. Paul Railway Company, and usually in cars of that company, and by that company transported to Rock Island, Illinois, one of the terminii of its line of road, and at that place the same were delivered to the Rock Island and Peoria Railroad Company, a connecting carrier, and by said last named company transported to Peoria, in said State of Illinois, and there delivered to the Chicago, Peoria and St. Louis Railway Company, a connecting carrier, which company was being operated by said Bosworth, as Receiver, and will hereafter be called the Receiver's company, and by that company transported to East St. Louis, Illinois, there to be delivered by the Receiver's company upon receiving orders from the consignees of said barley, to the Terminal Railroad Association of St. Louis, or the Wiggins Ferry Company, or some other connecting carrier, thence to be taken to its destination at St. Louis and there delivered to the consignees. This was the usual route employed by these parties for the shipment of their barley to St. Louis.

The Receiver's company had no terminal facilities whatever at East St. Louis, which was the southern terminus of its line of road; it had neither yard room nor switching facilities. It therefore entered into a contract with the Terminal Railroad Association of St. Louis whereby is secured the necessary yard room for handling and storing its cars, and switch engines and crews for

switching its cars to and from its main track and the tracks which it had the use of under its contract with the Terminal Association, and for making and breaking up its trains and for doing the necessary work of handling and moving its cars, for which the Receiver's company paid the Terminal Association a stated amount per car for each car handled. (Rau Rec., 111, 112.)

That on the evening of the 28th day of October, 1894, sixty cars loaded with barley, while standing on the tracks which the Receiver's company had the use of under its contract with the Terminal Association, were either damaged or totally destroyed by fire, said fire originating in the wooden warehouse hereinbefore referred to and characterized by the Receiver's answer as a "veritable fire-trap." That all of these sixty cars were loaded with barley at various stations on the railroad of the Chicago, Milwaukee and St. Paul Railway Company in Wisconsin, Minnesota and Iowa, and were all consigned to certain consignees at St. Louis, Missouri; that in due course of transportation said cars were delivered to the Receiver's company at said Peoria, and by that company hauled from said Peoria to the end of its line at said East St. Louis. At that point its road engines were uncoupled from the trains which brought the cars to East St. Louis and taken to the round house of the Terminal Association, which stored them under the aforesaid agreement. Thereupon and in pursuance of the agreement between the Receiver's company and the Terminal Association, whereby the latter furnished yard room, tracks and switching service for the Receiver's company, a switch engine and crew of the Terminal Association switched the cars from the place where they were left standing on the main track of the Receiver's company to the tracks which that company

had the use of under its agreement with the Terminal Association. There they remained standing until they were destroyed by fire as aforesaid.

It further appears from the record in these cases that under the custom which existed at East St. Louis in reference to handling the barley business of the Receiver's company, after cars containing barley had been placed upon these tracks which the Receiver's company used its agent at East St. Louis would take the way-bills under which the cars had been delivered into the possession of the Receiver's company and hauled to East St. Louis, which way-bills contained on their face the consignor, consignee, number, destination and contents of the car, and notify "*the consignee that we* (the receiver) *had a car numbered "so and so, loaded with barley, where do you want it?*" (Rau Rec., 205.) In due time, this notice which the Receiver's agent had sent to the consignee the consignee would send back to the Receiver's agent endorsed on the back with directions where the car should be sent. *This was done under an arrangement between the consignees of this barley and the Receiver's company, that it would hold their barley at East St. Louis subject to their orders*—so the Receiver's agent testified:

Q. Was that a different and separate transaction having reference to the orginal contract between the shippers and the C., M. & St. P.; *was it a new arrangement the consignee directed and controlled*, or was it the original arrangement named by the shipper?

A. *A new arrangement by the consignee, who placed orders with us to hold this barley.* (Rau Rec., 205.)

Thereupon the Receiver's agent would make out a way-bill containing the name of the consignee, the destination, number and contents of the car, take it to the agent of the

Terminal Association, deliver it to him, and take his receipt. Until this way-bill was received, the Terminal Association of course had no knowledge concerning these cars further than it had switched them from the main line of the Receiver's company to the tracks which that company had the use of under the aforesaid agreement, and had earned in consequence a certain amount, depending upon the number of cars switched. It did not and could not know until this way-bill was received that the cars contained barley, nor what they contained, or that they were destined to St. Louis or to some other point, and if so, where or to whom, or by what route they were consigned.

Upon the receipt of this way-bill from the Receiver's company's agent, the agent of the Terminal Association would give directions to the switching crew and they would take the car out of the Receiver's portion of the yard and place it in the Terminal Association's portion of the yard and there take it to the connection or destination indicated on the way-bill. (Rau Rec., 82.) For this service the Receiver's company paid the Terminal Association a stated amount for each car so switched. It further appears that cotemporaneous with the delivery of the way-bill by the Receiver to the Terminal Association, and not before, if the car named in the way-bill was the car of some company other than the Receiver's company, the Receiver's agent at East St. Louis would notify the car accountant of his company that car numbered, for example, 2,500, belonging to the Chicago, Milwaukee and St. Paul Railway Company, had that day been delivered to the Terminal Association. Thereupon such car accountant would send a formal notice, called a junction car report, to the car accountant of the Chicago, Milwaukee

and St. Paul Railway Company, notifying him of the delivery of the car to the Terminal Association. Up to the time of receiving this junction report, the car was charged to the Receiver's company on the books of the Chicago, Milwaukee and St. Paul Railway Company.

It further appears from the record that the Receiver made no proof of having ever sent to the consignee the usual and customary notice of the arrival of any of the cars in controversy. It also appears, and the fact is not in dispute, that no way-bill had been delivered to the Terminal Association for any of the cars in controversy, and that no notice had been sent by the Receiver's agent to his car accountant, or by that car accountant to the car accountant of the Chicago, Milwaukee and St. Paul Railway Company, that any of the cars in controversy had been delivered to the Terminal Association.

It also appears that the cars in controversy at the time they were destroyed by fire were standing on the tracks which the Receiver's company commonly use under its agreement with the Terminal Association, granting it track and yard room and other terminal facilities at East St. Louis. This fact was stipulated. (Rau Rec., 115.)

It also appears that after the foregoing facts had been testified to, counsel for Receiver's company stated that he had not been able to obtain the testimony of the consignees as he had anticipated, and therefore asked for further time, stating that he expected to prove by them that the Terminal Association, as an inducement to them to ship their barley by that route, agreed to hold the cars on *its tracks* at East St. Louis, and offered them other facilities in *its yards* at that place. To avoid further delay counsel for appellees admitted that if the persons named were present they would testify substantially as

counsel stated he expected they would testify—assuming, of course, that this arrangement, if it existed, became operative only after the cars had been delivered into the possession of the Terminal Association so that they could be said to be on *its tracks* and in *its yards*, and that delivery could not be said to have been made until the agent of the Receiver's company had delivered to the agent of the Terminal Association the customary way-bill containing the names of the consignor and consignee, the route and destination, and the number and contents of the car, and taken the receipt therefor. For until this had been done the Receiver's company had not parted with either the possession or control of the cars, and the Terminal Association could not know which of the cars that were standing on the tracks which the Receiver's company used were routed over its tracks, and if so, what they contained, where they were destined or to whom consigned, and until this information was received it would not, as a matter of course, accept delivery. (Rau Rec., 82, 86, 87, 90, 95.) And such delivery not having been made of any of the cars in controversy, the arrangement which counsel stated he expected to prove had no application to this case.

Palmer v. *C., B. & Q. R. R. Co.*, 13 Atl. Rep., 818.

Mt. Vernon Co. v. *Ala. Gt. North. Ry. Co.*, 92 Ala., 296–298.

Texas & Pacific Ry. Co. v. *Clayton*, 51 U. S. App., 676.

Third. It was upon the foregoing facts that the court rendered its decision reversing the decrees of the court below. Presiding Judge Woods held that the decrees should be reversed on the ground that the arrangement

between the consignees and Terminal Association, which counsel for Receiver's company stated he expected to prove, became effective immediately upon the cars being placed on the tracks which the Receiver's company used under its agreement with the Terminal Association; that as soon as the cars were so placed on these tracks, that Association would be deemed to be holding them, notwithstanding there had been no delivery of them in the usual and customary way that deliveries were made at that place by the Receiver's company to the Terminal Association, and that this would be true although the Terminal Association had no knowledge of the destination, consignee or contents of the car. He cites as sustaining his position the case of *Pratt* v. *Ry. Co.*, 95 U. S. 43, and the case of *Mount Vernon Company* v. *Ala. Gt. North. Ry. Co.*, 92 Ala., 296.

Judge JENKINS writes a dissenting opinion, holding that the decrees should be affirmed. In commenting upon the opinion of the presiding judge he says:

"I am unable to concur in this conclusion. I have sought to show that there had been no delivery of these cars to the Terminal Association. It had not knowledge of their destination. It had not knowledge of the consignees of them. They were subject to the direction and control of the Receiver. The Terminal Association under its contract with the Receiver had placed these cars upon these tracks for the Receiver and for a compensation agreed upon. It therein was the agent of the Receiver. It could not know whether these cars were to be transported over its line or the lines of the Wiggins Ferry Company; it could not know in what direction they were to be transported, or their ultimate destination; when it had placed the cars on its track pursuant to its contract with the Receiver, it had nothing further to do with them until the Receiver had dispossessed himself of possession and control and had invested the Terminal Association therewith. I cannot comprehend that the general agree-

ment between the Terminal Association and consignees can become operative with respect to the contents of these cars until delivery to the Terminal Asaociation and it had been invested with the exclusive possession and the exclusive control of them. The force of the reasoning is not perceived whereby it is held that because in fact these goods were ultimately to go to persons who had contracted with the Terminal Association—of which contract Receiver had no knowledge—therefore these goods were held under that contract before delivery in fact to the Terminal Association and before it was invested with exclusive control of them. * * * The question here is whether the Receiver is absolved from liability ; whether failing a delivery of the cars to the Terminal Association, failing a surrender by the Receiver of control over them, with ignorance upon the part of the Terminal Association of their destination or their consignees, the agreement between the Terminal Association and the consignee had become operative with respect to these goods. I think not. If the Receiver had directed that the Terminal Association under its contract with him should transfer these goods to the Wiggins Ferry Company, his order must have received recognition and have been carried out by the Terminal Association, and it cannot be doubted that up to the time of the fire in question the goods were so subject to the Receiver's direction and control. For these reasons I think that the decrees appealed from should be affirmed."

He also cites *Pratt* v. *Ry. Co.*, *supra*, and *Mount Vernon Company* v. *Ala. Gt. North. Ry. Co.*, *supra*, to sustain his position.

Judge Showalter, in his opinion, holds that the moment the switch engine of the Terminal Association was coupled to the train of the Receiver's company, for the purpose of switching it from the main line of that company to the tracks which the Receiver's company used under its agreement with the Terminal Association, the Receiver's company's liability as a common carrier ceased and that of the Terminal Association began, and that the Receiver's

company was not again invested with any liability either as a common carrier or as a warehouseman in regard to cars so handled. He also cites the cases of *Pratt* v. *Ry. Co.*, and *Mount Vernon Company* v. *Ala. Gt. North. Ry. Co.*, to sustain his position.

These opinions are a part of the certified copy of the transcript of record herein.

Fourth. Your petitioners further show that they are informed and believe and do therefore respectfully represent and submit that there are good and sufficient reasons why the judgment of said Circuit Court of Appeals should not be allowed to stand as the final judgment in these cases, but that the record herein made should be reviewed and these cases finally determined by this Honorable Court; and they therefore present this, their separate petition, to that end, and in support thereof urge the following reasons:

1. That the opinions delivered by Judges Woods and Showalter, the two judges constituting a majority of said Circuit Court of Appeals, are not entitled to any strong presumption of correctness, for they are not only opposed to each other, but are opposed to those announced by Judges Jenkins and Allen and by Master in Chancery Brown.

2. That by reason of the difference of opinion among the judges of the Circuit Court of Appeals the questions of law involved in these cases are in a state of grave and serious uncertainty, and that the decision of the majority of the judges of said Circuit Court of Appeals is not consistent with the decisions of this Honorable Court, especially in the cases of *Pratt* v. *Railway Co.*, 95 U. S., 43, and *Covington Stockyard* case, 139 U. S., 128; nor with the decision of the Circuit Court of Appeals for the Second Circuit in *Texas and Pacific Railway Co.* v.

Clayton, 51 U. S. App., 676, S. C. 84 Fed. Rep., 305, nor with the decisions of the state courts:

Mt. Vernon Co., v. *Ala. Gt. Nor. Ry. Co.*, 92 Ala., 296, 298.

Palmer v. *C. B. & Q. R. R. Co.*, 13 Atl. Rep., 818.

3. That the questions involved in the correct decision of these cases are most important, as will appear by a reading of the opinions of the judges of said Circuit Court of Appeals. The amount involved in these cases is not only large, but there are numerous other claims pending against the Receiver growing out of the same fire, which the parties have agreed shall abide the final determination of these cases. But aside from any monetary consideration, the commercial considerations involved are all-important. In recent years there has come into existence at all large commercial centers in the west, like Chicago, St. Louis, Kansas City, St. Paul and Minneapolis, corporations that are organized for the double purpose of supplying terminal facilities to railread companies which are unprovided with such facilities, and of transporting such freight as is received from their connections to the points and places of industry that are reached by their various tracks. The Terminal Railroad Association of St. Louis is such a corporation. It not only furnishes terminal facilities such as yard and track room for handling and storing cars and switch engines and crews to such railway companies as have need of such facilities at East St. Louis, but transports all freight which such companies deliver to it from East St. Louis to such places as its various tracks reach in East St. Louis and St. Louis. The Receiver's company had no terminal facilities whatever at East St. Louis, the southern terminus of its line of rail-

road. It contracted with that Association for the necessary yard room and track facilities and switch engine and crews for handling its cars, making and breaking up its trains and for storage room for a reasonable number of cars, not exceeding 150 at any one time. Under this contract so much of tracks numbered from forty to fifty in the yards of the Terminal Association as was necessary to give the Receiver's company room for 150 cars was set aside and used by that company in the transaction of its business. The cars of barley in controversy at the time they were destroyed by fire were standing on some one or more of these ten tracks, having been switched there from the main line of the Receiver's company by the switch engine and crew of the Terminal Association under its agreement to furnish that company with certain terminal facilities. No way-bill or other manifest, giving the name of the consignee, or route, or destination, or the number or contents of the car, had been tendered or delivered to the Terminal Association for any of the cars, although the invariable custom and practice at that place between the two companies was to tender such a way-bill whenever it was intended to make a delivery of a car of freight; and a delivery was never regarded as having been made until a way-bill had been tendered and accepted and the car named therein taken from the tracks which the Receiver's company used under its agreement with the Terminal Association, and switched to the tracks of that Association. Proceedings were taken against the Receiver's company to recover the value of the cars and their contents, the claim being that they were in the possession of that company when the loss occurred. After a litigation lasting three years, the claimants are advised by a divided court, Judge Jenkins dissenting, and Judges Woods and Showalter disagreeing with each other

quite as much as with Judge Jenkins, that the wrong carrier has been pursued, and that their remedy is against the Terminal Association. These cases, therefore, not only involve the question, what constitutes a delivery of freight in car-load lots, as between carriers in the ordinary course of business, but as between carriers sustaining to each other the relation which existed between the Receiver's company and the Terminal Association by virtue of the contract under which the former acquired from the latter the use of such terminal facilities as its needs at East St. Louis required. And when it is considered that arrangements such as existed between the Receiver's company and the Terminal Association at East St. Louis are in operation in nearly all the large commercial and railway centers of the United States, and that there are hourly vast quantities of freight of immense value in cars standing on tracks under circumstances and conditions that are substantially similar to those that are present in these cases, and the interest which the owners of such freight in the event of loss have in knowing in which carrier the possession is, the questions involved in these cases are too important to be left in the unsatisfactory and unsettled condition in which they are left by the opinions of the two judges constituting a majority of said Circuit Court of Appeals.

Wherefore, your petitioners respectfully and separately pray that writs of *certiorari* may be issued out of and under the seal of this Honorable Court, directed to the United States Circuit Court of Appeals for the Seventh Circuit, commanding said court to certify and send to this court on a day certain, to be therein designated, a full and complete transcript of the record, and all proceedings of said Circuit Court of Appeals in each of the said cases therein, entitled as follows:

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT—OCTOBER TERM, A. D. 1897.

MERCANTILE TRUST COMPANY
vs.
CHICAGO, PEORIA & ST. LOUIS RAILWAY COMPANY *et al.*

In the matter of the intervening petition of the Chicago, Milwaukee & St. Paul Railway Company.

C. H. Bosworth, Receiver, etc., *Appellant*,
vs.
The Chicago, Milwauke & St. Paul Railway Company, *Appellee*.
No. 442.

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT—OCTOBER TERM, A. D. 1897.

MERCANTILE TRUST COMPANY
vs.
CHICAGO, PEORIA & ST. LOUIS RAILWAY COMPANY *et al.*

In the matter of the intervening petition of Jacob Rau.

C. H. Bosworth, Receiver, etc., *Appellant*,
vs.
Jacob Rau, *Appellee*.
No. 452.

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT—OCTOBER TERM, A. D. 1897.

MERCANTILE TRUST COMPANY
vs.
CHICAGO, PEORIA & ST. LOUIS RAILWAY COMPANY *et al.*

In the matter of the intervening petition of the Huntting Elevator Company.

C. H. Bosworth, Receiver, etc., *Appellant*,
vs.
The Huntting Elevator Company, *Appellee.* } No. 453.

to the end that each of said cases may be reviewed and determined by this court as provided in section 6 of the act of Congress entitled "An act to establish Circuit Courts of Appeal and to regulate in certain cases the jurisdiction of the Courts of the United States, and for other purposes," approved March 3, 1891; and that each of your petitioners may have such other or further relief or remedy in the premises as to this court may seem appropriate and in conformity with the said act, and that the said decision of the said Circuit Court of Appeals in each of said cases may be reversed by this honorable court, and your petitioners will ever pray.

CHICAGO, MILWAUKEE AND ST. PAUL RAILWAY COMPANY,
THE HUNTINGTON ELEVATOR COMPANY, and
JACOB RAU,
Petitioners,

By Geo. R. Peck & Thos. E. Hanna,
Their Attorneys

STATE OF ILLINOIS, }
COUNTY OF COOK. } ss.

Burton Hanson, being duly sworn, says that he is one of the attorneys for the Chicago, Milwaukee and St. Paul Railway Company, the Huntting Elevator Company and Jacob Rau, the petitioners above named, and as such attorney he has had personal charge for said petitioners of the cases in the foregoing petition mentioned, in the Circuit Court of the United States for the Southern District of Illinois and in the United States Circuit Court of Appeals for the Seventh Circuit; that he has read the foregoing petition, and that the facts therein stated are true, to the best of his knowledge, information and belief.

Burton Hanson

Subscribed and sworn to before me this 16th day of April, A. D. 1898.

.....

Notary Public, Cook County, Ill.

IN THE SUPREME COURT OF THE UNITED STATES—
OCTOBER TERM, 1897.

To Honorable Bluford Wilson and Philip Barton Warren, Attorneys for C. H. Bosworth, Receiver, named in the annexed and foregoing petition:

In the cases mentioned in the annexed and foregoing petition, you will please take notice that on Monday, the

2nd day of May, 1898, at the opening of court, or as soon thereafter as counsel can be heard, the petition of which the foregoing is a copy will be submitted to the Supreme Court of the United States for a decision of the said court thereon.

Yours, &c.,

Geo. Klee

Arthur Stanwood

Attorneys for Chicago, Milwaukee and St. Paul Railway Company, The Hunting Elevator Company, and Jacob Rau, Petitioners.

Service of a copy of the foregoing notice and of the petition for *certiorari* annexed thereto is hereby admitted this ..... day of ....., 1898.

.....

.....

Attorneys for C. H. Bosworth, Receiver, &c.





No. 645 Oct. Term 1897.

1954

Brief of Peck & Hanson

Filed April 26, 1898.

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1897.

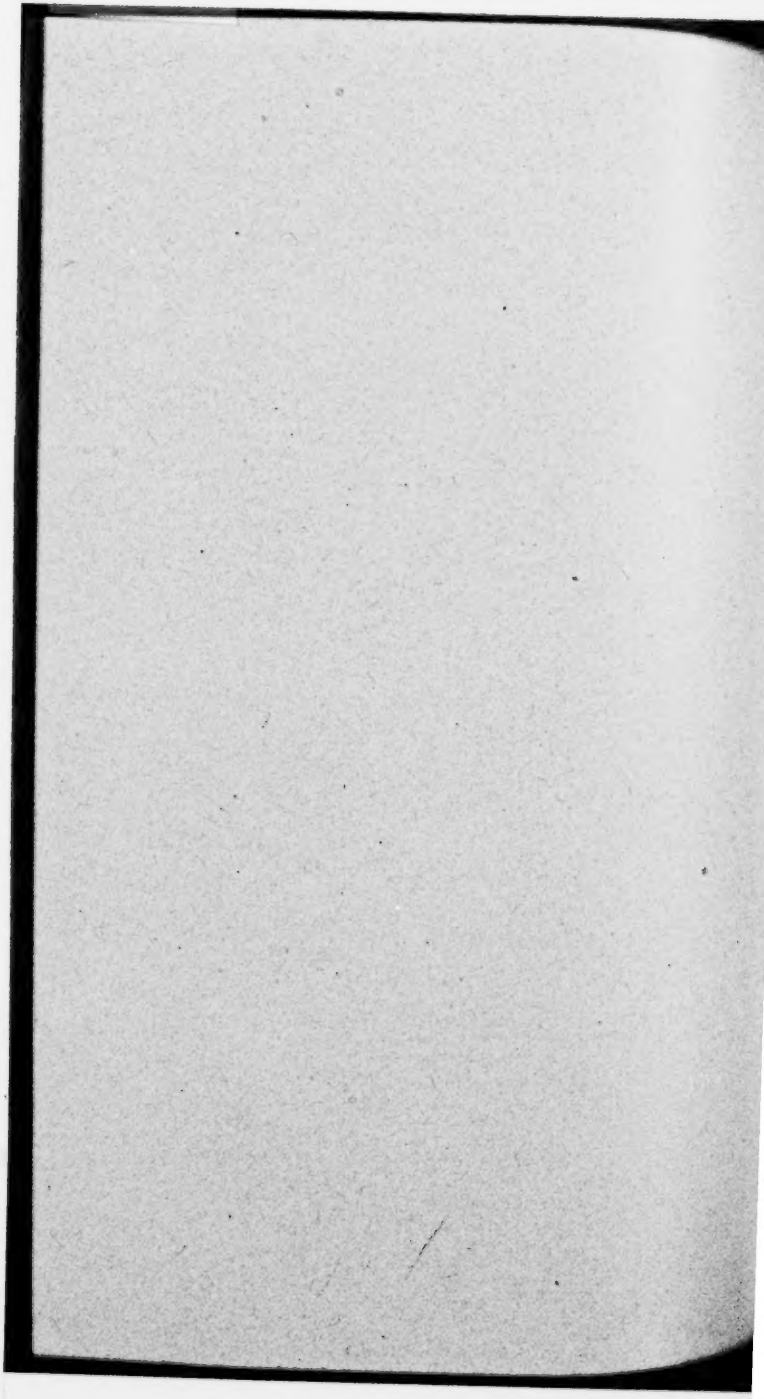
THE MERCANTILE TRUST COMPANY,
Complainant,
vs.
CHICAGO, PEORIA & ST. LOUIS RAILWAY COMPANY et al.,
Defendants.

In the matter of the Intervening Petitions of the Chicago, Milwaukee & St. Paul Railway Company, The Huntting Elevator Company and Jacob Rau.

Brief in Support of the Separate Petitions of the Chicago, Milwaukee & St. Paul Railway Company, The Huntting Elevator Company and Jacob Rau, for Writs of Certiorari, to the United States Circuit Court of Appeals for the Seventh Circuit.

GEO. R. PECK,
BURTON HANSON,
COUNSEL FOR PETITIONERS.

The Gunthorp-Warren Printing Company, 53 Dearborn St., Chicago.



IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1897.

THE MERCANTILE TRUST COMPANY,
Complainant,
vs.
CHICAGO, PEORIA & ST. LOUIS RAILWAY COMPANY ET AL.,
Defendants.

In the matter of the Intervening Petitions of the Chicago, Milwaukee & St. Paul Railway Company, The Huntting Elevator Company and Jacob Rau.

Brief in Support of the separate Petitions of the Chicago, Milwaukee & St. Paul Railway Company, The Huntting Elevator Company and Jacob Rau, for Writs of Certiorari, requiring the United States Circuit Court of Appeals for the Seventh Circuit to certify to the Supreme Court for its review and determination the cases of

C. H. BOSWORTH, RECEIVER, ET AL.,
Appellants,
vs.
CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY,
Appellee.

C. H. BOSWORTH, RECEIVER, ET AL.,
Appellants,
vs.
THE HUNTTING ELEVATOR COMPANY,
Appellee.

C. H. BOSWORTH, RECEIVER, ET AL.,
Appellants,
vs.
JACOB RAU,
Appellee.

STATEMENT OF FACTS.

The case presented by the record and the petition for writs of certiorari is this: One Bosworth, as Receiver,

operated the Chicago, Peoria and St. Louis Railway Company, which had a line of railroad from Peoria to East St. Louis, both in the State of Illinois. Having no terminal facilities whatever of his own at the latter place, the Receiver entered into a contract with the Terminal Railroad Association of St. Louis, whereby that Association undertook and agreed to furnish him necessary yard room, track facilities, switch engines and crews for handling his business, making and breaking up his trains that arrived at and departed from that place, *and storage room for a reasonable number of cars, not exceeding 150 at any one time.* Under this agreement, so much of tracks numbered from 40 to 50 as was necessary to give the Receiver storage room for that number of cars was, quoting from the second subdivision of the contract, "set aside for the use of the party of the second part," the Receiver. (Rau Rec., 111.) And these were the tracks that were commonly and usually used by the Receiver for handling and storing his cars and upon which they were placed upon their arrival at East St. Louis, and where they remained standing until they were delivered to the Terminal Association, or other disposition had been made of them. (Rau Rec., 76, 78, 81, 82, 95, 101, 181, 202, 229, 232; and Stipulation 2d Subdiv. Rau Rec., 115.) The practice under this agreement was that upon the arrival at East St. Louis of the Receiver's trains, they would come to a stop at the end of his track and there they would stand until a switch engine of the Terminal Association would hitch to them and switch them to some one or more of the ten tracks which the Receiver had the use of under his agreement with that association. After having been switched to these tracks, the cars would remain there until the Receiver gave directions to

the Terminal Association for their further shipment or transportation. If they were destined to St. Louis or to points beyond by way of the Terminal Association, the Receiver would make out a manifest, called a way-bill, which contained on its face the name of the consignor and consignee, the route and destination and number, name and contents of the cars, and deliver that to the agent of the Terminal Association and take his receipt therefor. Thereupon the switching crew of the Terminal Association would take the way-bill, take the cars named therein out of the Receiver's portion of the yard and place them in its portion of the yard, put them into a train and take them to the connection or destination indicated by the way-bill. If the cars were routed by some other line than that of the Terminal Association, such as the Wiggins Ferry, a competing line, they would be switched by the Terminal Association from the tracks which the Receiver used under his agreement with that Association, to the tracks of the ferry company. This service was performed under the agreement with the Terminal Association. (See 4th subdivision thereof, Rau Rec., 11.) The manner in which the Receiver's cars were handled after their arrival at East St. Louis is probably best told by the witnesses themselves. They are George H. Felps, agent of the Terminal Association, W. H. Calvert, agent of the Receiver, E. R. Stapleton, his chief clerk, and the Receiver himself.

Geo. H. Felps testified as follows:

Q. What company breaks up this train and places the cars on the tracks marked red?

A. The Terminal Railroad Association.

Q. That done under the agreement introduced here?

A. Yes sir; at a certain sum per car.

Q. What sum?

A. Fifty cents a car.

Q. When that train is broken up, as you have stated, and the cars set on the tracks marked red, what is then done with these cars?

A. We are done with the cars then until we get way-bills from the agent of the C. P. & St. L.

Q. From the receiver?

A. Yes, sir; from the agent of the receiver.

Q. What is a way-bill?

A. A manifest showing what disposition is to be made of the freight.

Q. When you receive the way-bill of a car what do you do then?

A. Card that car out, and our yardmen are instructed to switch it out and deliver it according to the instructions.

Q. Does the way-bill contain the number of the car and destination?

A. Yes, sir; consignee, destination and route.

Q. *When you receive this way-bill and switch the car out, where do you take it?*

A. *Take the car out of their yard, their portion of the yard, and place it in the train in our portion of the yard, and take it to the connection or destination indicated.* (Rau Rec., 82.)

And further at page 86 he testified:

Q. What was the custom in respect to handling these cars set out on these tracks, after they had been set there on the part of the Terminal Association?

A. *We had nothing to do with them at all until we received way-bills, if they stood there till doomsday.*

E. R. Stapleton, witness for Receiver, testified as follows:

Direct Examination.

Q. A train comes in on this "Y," what is then done with it by the receiver, if anything?

A. The trains stops on the "Y" and the receiver is done with them.

Q. Is that true?

A. Yes, sir; the receiver does not handle the cars or control their handling in a *direct* way after that. (Rau Rec., 199.)

Cross-Examination.

Q. The major asked if the receiver was done with them, so far as handling the cars?

A. So far as the handling of the cars.

Q. *The receiver did have something else to do with them with reference to sending them on to St. Louis in the way of giving way-bills?*

A. *Yes, sir; giving way-bills.*

Q. When those way-bills are made out by the agent at East St. Louis they are delivered to the Terminal Association?

A. And their receipt taken.

Q. Of the way-bill?

A. Yes, sir.

Q. So you would have the receipt of every way-bill delivered?

A. Yes, sir.

Q. Then the Terminal Association would take these cars according to the direction on the way-bill?

A. Yes, sir. (Rau Rec., 203, 204.)

W. H. Calvert, a witness for Receiver, testified as follows:

Q. When way-bills were made out by the receiver at East St. Louis for barley consigned to St. Louis and other points to which the Terminal Association was to take it, where were the way-bills made out—at your office?

A. Yes, sir.

Q. That would be way-bills of all cars going to some other points than East St. Louis?

A. Yes, sir; except such as were to go to Wiggins Ferry, in which case the way-bills would be delivered to the Wiggins Ferry.

Q. None of the cars in controversy here—barley—went by the way of Wiggins Ferry?

A. No, sir. (Rau Rec., 255.)

C. H. Bosworth, the receiver, testified as follows:

Q. Isn't it a universal custom whenever there is a car delivered from one company to another, consigned to a point beyond, before that car is taken by the company to which it is delivered and moved on to its destination a way-bill accompanies that car and is delivered to the receiving company?

A. I can't say it is a universal custom.

Q. How would the receiving company know what to do with a car without a way-bill?

A. Might take the directions of the agent; *I will state it is undoubtedly generally the case.* (Rau Rec., 247.)

And on page 248 the Receiver testified that until the Terminal Association received a way-bill it would not undertake to move a car, and that until a way-bill was delivered or instructions given to the agent of the Terminal Association the car was subject to his, the Receiver's orders.

The cars of barley in controversy came into the possession of the Receiver at Peoria from a connecting line of road. Their destination was St. Louis, Missouri. They were hauled by the Receiver to the end of his main track at East St. Louis. Upon their arrival there they were switched from such main track by a switch engine of the Terminal Association and placed upon some one or more of the ten tracks which the Receiver had the use of in the yards of that Association under the aforesaid agreement. There they remained standing until they were destroyed by fire, which occurred on the evening of the 28th day of October, 1894. *No way-bill had been delivered by the Receiver to the Terminal Association for any of the cars in controversy.* The petitioners base their right to recover on the ground that the cars and the barley they contained at the time they were destroyed by fire were in the possession of the Receiver and that he negligently

allowed them to stand or to be stored on tracks near by a long wooden warehouse that was filled with loose hay, through and into which locomotivs engines were continually passing and repassing, which warehouse taking fire was itself consumed along with said cars and their contents. The Receiver denies that the cars were in his possession at the time they were destroyed by fire, and alleges that before the fire occurred he had delivered them and their contents to the next connecting carrier, the Terminal Association, and that they were in the possession of that Association at the time of the fire, and that that Association negligently placed them alongside said wooden warehouse, which he characterizes as "a veritable fire-trap." The pleadings, therefore, raise a single issue: Were the cars and their contents at the time they were destroyed in the possession of the Receiver, or had they been delivered by him to the next succeeding carrier, the Terminal Association? The Master to whom the cases were referred, District Judge Allen, who presided at the Circuit, and Circuit Judge Jenkins, held that there had been no delivery of the cars by the Receiver to the Terminal Association and that he was liable for the value of the cars and their contents, while Circuit Judges Woods and Showalter held that there had been a delivery of the cars by the Receiver to the Terminal Association, but each disagreed with the other as to the reasons therefor.

ARGUMENT.

I.

Circuit Judge Showalter, in his opinion, holds that the act of the Terminal Association, in switching the cars from the Receiver's main track to the tracks which he used under his agreement with that Association, constituted a delivery of the cars by the Receiver to the Terminal Association, and that a delivery of the customary way-bill was not necessary to a delivery of the cars. This holding, we submit, is not only utterly opposed to the custom under which deliveries of cars were made by the Receiver to the Terminal Association at East St. Louis, as disclosed by the undisputed testimony, but is in conflict with the decisions of this and other courts.

There is no dispute in the testimony as to the custom under which deliveries of cars were made at East St. Louis by the Receiver to the Terminal Association. This custom was that a car was never treated as delivered until a way-bill therefor was passed to the Terminal Association. It is apparent to anyone who is at all familiar with the transportation business of the country that this must, in the very nature of things, be the custom and practice, for it can readily be seen what confusion and delay would arise in the interchange of traffic in car-loads between the various railway companies if each company should, upon the arrival of cars at the terminus of its line of road, or at such other place where delivery is made to the next succeeding carrier, claim that it had made a delivery by merely placing or causing cars to be placed upon certain tracks without notifying such succeeding carrier, either

by way-bill or otherwise, of the delivery, or giving any instructions or directions for their further transportation. It is clearly apparent that without such a way-bill, or something that is its equivalent, the succeeding carrier would not know what disposition to make of the car. It would not know its contents, its route or destination or the party to whom it should be delivered, neither would it have any data upon which it could make a charge for transporting it. All this information is withheld by the preceding carrier, in this case the Receiver, until the customary way-bill is delivered, and so long as it is withheld from the succeeding carrier, there cannot, in the very nature of the transaction, be a delivery of the property to which such information applies. It is to the interest of both shippers and carriers, as well as to the general commerce of the country, that there should exist no doubt as to what constitutes a delivery of property in course of transportation, as between connecting carriers.

That cars were never treated as delivered to the Terminal Association until the Receiver had delivered way-bills therefor, is clearly shown by another circumstance which the undisputed testimony discloses, which is that whenever the Receiver delivered cars to that Association, if such cars belonged to some other company, his car accountant immediately on the very day of the delivery of way bills therefor, and not until then, reported to the company owning the cars the fact that certain of its cars, giving their numbers, had on that day been delivered by the receiver to the Terminal Association. This was the practice at East St. Louis as well as at all junction points. (Rau Rec. 88, 89, 90, 98, 106, 153, 154, 155, 247.) These reports are called junction reports, and by means of them each railway company is advised of the where-

abouts of its cars when they are out of its possession. Mr. Beecham, car accountant of the Chicago, Milwaukee and St. Paul Railway Company, and Mr. Bradley, the Receiver's car accountant, both testified that the Receiver had not reported any of the cars in controversy as having been delivered to the Terminal Association. (Rau Rec., 99, 106, 154, 155. This was because no way-bill had been delivered by the Receiver to the Terminal Association of any of the cars of barley in controversy. And in this connection, the attention of the court is called to the significant fact that prior to and up to the time of the fire, whenever the Receiver delivered a way-bill to the Terminal Association, at the same time such way-bill was delivered, he caused to be sent by his car accountant to the car accountant of the company whose cars were delivered, by such way-bill, a report called a junction report, advising that company of the delivery of the car named in such way-bill to the Terminal Association, and not until a way-bill had been delivered for such car was that car reported delivered to that Association. So that a junction report and a way-bill went hand in hand with every car that was delivered by the Receiver to the Terminal Association. For example: Mr. Felps, the agent of the Terminal Association, testified (Rau Rec., 86, 87) that on the 28th day of October, the day of the fire, the Receiver delivered three cars of the Chicago, Milwaukee and St. Paul Railway Company, Nos. 2,100, 31,872 and 16,562, to the Terminal Association by delivering way-bills therefor. By referring to the testimony of Mr. Beecham (Rau Rec., 100, 101, and Exhibit "E," Rau Rec., 128, 129), it will be seen that on the very day the way-bills for these three cars were delivered to the Terminal Association, the Re-

ceiver's car accountant reported these three cars as having been delivered on that day to the Terminal Association.

Now what does Mr. Felps say he did immediately upon the receipt of the way-bills for these three cars?

Q. What did you do after receiving these way-bills with respect to those cars?

A. Cars carded out as usual to their proper connections or destinations.

Q. Following the directions of the way-bills?

A. Yes, sir; in accordance with the instructions.

Q. Was the service rendered by the Terminal Association, in breaking up of the train of the receiver when it came in on the "Y," and placing the cars on these tracks marked red, a separate and distinct service from the work you did after receiving the way-bills?

A. It was a separate and distinct service.

Q. Explain how and why?

A. We received for this service, taking care of the cars for which we had way-bills, a separate revenue.

Q. Separate from what?

A. From making and breaking up trains. (Rec., 87.)

By an examination of the testimony it will be seen that in every instance the Receiver did not report a car as having been delivered to the Terminal Association until he had delivered a way-bill therefor to that Association.

This custom is in accord with the views of text writers and the decisions of the courts. Ray, on Freight Carriers, 388, says:

"The placing of a car by an initial carrier on the side track of a connecting carrier, without giving the latter any notice and without marking it with the name and address of the consignee, *or sending any way-bill or shipping directions*, does not establish the relation of common carrier between the initial and the connecting carrier.

The following cases hold the same rule:

Tex. & Pac. Ry. Co. v. *Clayton*, U. S. C. C. A., 2nd Cir., 51 U. S. App., 676; s. c. 84 Fed. Rep., 305.

Mt. Vernon Car Co. v. *Ala. G. S. Ry. Co.*, 92 Ala., 296.

Ins. Co. v. *Ry. Co.*, 55 Tenn. Repts., 268.

Palmer v. *Pa. Co.*, Conn. Sup. Ct., 13 Atl. Rep., 818.

In *Mt. Vernon Car Co.* v. *Ala. G. S. Ry. Co.*, *supra*, the court say:

"The same rule is applicable in the case of connecting carriers; the responsibility peculiar to the common carrier is not devolved on the next connecting carrier until the receiving carrier has delivered the goods to the former with directions for their shipment, the place of destination and to whom consigned. *Until this is done the relation of common carrier is not established between the shipper and the connecting carrier.*"

In *Texas & Pacific Ry. Co.* v. *Clayton*, *supra*, the question of delivery between connecting carriers was discussed by Circuit Judge WALLACE. He says:

"It may be safely affirmed, as a proposition applicable to all cases, that a deposit of the goods with notice, express or implied, at any place where the second carrier has control of them, conformable with usage created by the course of business between the two carriers, is a sufficient delivery, and discharges the first carrier. The liability of the second carrier begins when that of the first ends. * * * In the present case the cotton had never been placed within the control of the steamship line of the defendant. * * * Before the steamship line could have identified it for the purpose of removal, and after that, before they could have exercised any control over it, the co-operation and assistance of the defendant were necessary."

So here the Receiver up to the time the cars of barley were destroyed had full control over their further movement. For without the information which would be conveyed by the delivery of the customary way-bill, the Terminal Association could not identify them for further transportation, neither could it transport them, as it had no knowledge concerning their contents, their route, destination or consignee. This information was all with the Receiver, and until he imparted it to the Terminal Association by the delivery of the customary way-bill, that Association could exercise no control over the cars in the way of their further transportation.

These decisions are all in harmony with the rule of this court announced in *Pratt* v. *Grand Trunk Ry. Co.*, 95 U. S., 43, cited by Circuit Judge Jenkins in his dissenting opinion. In this case the freight in controversy was *package* freight. Something more is required in making a delivery of a car loaded with merchandise from one carrier to another, than is required in making a delivery of package freight. The package is addressed and the receiving company can readily ascertain from the package itself the consignee and destination, but a freight car has no marks nor address upon it showing the consignee, route or destination. This information is only found in the way-bill, and until that is delivered there can not in the very nature of things be a delivery of the car.

The Terminal Association in switching the Receiver's cars from his main track and placing them upon the tracks which he had the use of under his agreement, did not thereby take possession of such cars or accept delivery of them as a carrier. Whatever possession it thereby had of the cars was under its agreement to furnish the Receiver the use of certain tracks in its yards for *his* cars,

and to switch *his* cars from his main line to certain other of *his* tracks. As between the petitioners and the Receiver, these tracks were his tracks and the switch engines his engines, as much so as if he had owned them outright. And the cars and the freight they contain while on these tracks were the Receiver's so far as handling and caring for them. The preamble of the agreement makes this plain:

"That, whereas, the party of the first part undertakes to give to the party of the second part (the receiver) terminal facilities at East St. Louis for the handling of *its* (his) trains, care of *its* (his) engines and cars, and the handling and care of *its* (his) freight, under the following terms and conditions:"

While this agreement did not exclude the relation of connecting carriers as between the Receiver and the Terminal Association, neither did it change their relation. The same acts were required of the Receiver in making a delivery of cars to the Terminal Association as would have been required had there been no contract relations between the two and the Receiver had owned the necessary terminal facilities at East St. Louis. In treating the question as to what constitutes a delivery as between the Receiver and the Terminal Association, the agreement by which the Receiver acquired the use of certain terminal facilities at that point should be wholly eliminated and the case treated precisely as it would be treated if the Receiver owned the terminal facilities which he used under his agreement with that Association. Carriers cannot shift responsibilities by contracting with others to perform the duty incumbent upon them. (*R. R. Co.* v. *Reich*, 32 S. W. Rep., 818.) It must, therefore, be regarded as a fact that the terminals which the Receiver used at East St. Louis were for all purposes, as

between him and the petitioners, his terminals, and that the tracks, engines and the men employed about them in the handling of cars brought there by his trains were all his. So that when his trains arrived at East St. Louis, were broken up, and the cars placed on certain tracks which he had the use of, under his agreement as between him and the petitioners, the engines and the cars doing this work were his, and the tracks upon which the cars were left standing until they were way-billed out were likewise his tracks. The case, therefore, stands as if the Receiver had, in fact, owned the terminals which he, in fact, used, and the trains had been broken up by his own switch engine and switching crew and the cars placed upon his own tracks. Had the Receiver owned the facilities which he had the use of and, in fact, did use under his agreement with the Terminal Association, no one would for a moment contend that the breaking up of his trains and placing the cars upon the tracks where they stood at the time of the fire constituted a delivery of them to the Terminal Association. And yet there is as much warrant for such a contention as there is to justify the claim which is now put forth, that he had delivered these cars and their contents to that Association by simply having them switched from his main track to other of his tracks which he used in handling his business at East St. Louis. Up to the time that the Terminal Association took possession of cars under way-bills which had been delivered to it, it did nothing with them that the Receiver would not have done had these terminal facilities been his own. The Terminal Association therefore acted merely as the servant or agent of the Receiver in breaking up his trains and placing his cars on certain tracks, for which it received from the Receiver fifty cents a car. *One rail-*

way company does not pay to another railway company fifty cents a car for the privilege of delivering cars to it. And the fact that the Receiver under his agreement paid the Terminal Association fifty cents a car for breaking up his trains and placing them on these tracks, shows conclusively that in doing this work it was not expected nor intended by either of the parties that a delivery was thereby made of the cars so handled to the Terminal Association.

It was stipulated between the parties that the cars of barley in controversy at the time they were destroyed by fire were standing on the tracks that were commonly used by the Receiver under his agreement with the Terminal Association. (Rau Rec., 115.) This fact in connection with the undisputed testimony in the case, that no way-bill had been delivered for any of the cars to the Terminal Association, and that the Receiver had not reported the delivery of any of the cars to the Chicago, Milwaueee and St. Paul Railway Company, the company owning them, proves conclusively that the cars at the time of the fire had not yet been delivered to the Terminal Association and fully sustains the position of Circuit Judge Jenkins in his dissenting opinion.

II.

Circuit Judge Wood bases his conclusion that there had been a delivery of the cars and their contents to the Terminal Association wholly upon the statement of counsel for the Receiver made at the conclusion of the hearing before the master (Rau Rec., 260), that he expected certain of the consignees to have been present and expected to prove by them that the Terminal Association

had an arrangement with them by which it agreed to hold cars of barley on "*their tracks*" (meaning the tracks of the Terminal Association) at East St. Louis, and give them other facilities in "*their yards*" at that place, and the consent of counsel for petitioners that the witnesses, if present, would testify substantially as counsel expected they would testify.

We feel that a wrong construction has not only been given to this statement, but an importance attached to it which is not warranted by facts which are indisputably proven, and which we believe should be all-controlling in this case.

In considering the question of the delivery of freight as between connecting carriers when the same is in course of transportation, the rule that when possession is once proven to be in certain one of several carriers, the presumption is that such possession continues in that carrier until it is proven to be elsewhere, and that the burden is upon that carrier to show delivery, should not be lost sight of. And this burden is not met by offering proof that is conflicting or uncertain in its character or meaning, or proof that is susceptible of different constructions, theories and inferences. *The proof must be certain and convincing, and, taken as a whole, consistent with no other theory than that of delivery. This is the rule.* And it should be adhered to strictly in view of the other rule of the federal courts, which is not the rule in most of the state courts, that the carrier in whose possession property is at the time of loss is alone responsible, and not the initial carrier, unless it is shown by clear and satisfactory proof that such carrier contracted for liability beyond its line; and such liability is never inferred from proof that is uncertain or doubtful.

Myrick v. *R. R. Co.*, 107 U. S., 102.

The difficulties which beset shippers over several connecting lines of carriers, in case their property is lost, unless the rule that the carrier in whose possession the property is once shown to be shall show delivery by proof that is certain, clear and satisfactory, is strictly enforced, is well illustrated in the case at bar. After a litigation lasting three years, the claimants are now advised by a divided court, each judge differing with the other, that they have been pursuing the wrong carrier. They have no contract with the initial carrier for a through liability; they made the best investigation they could, and after tracing the property into the possession of the Receiver, and being informed that the Receiver's agent at East St. Louis, under the direction of the Receiver, in making proofs of loss to the insurance companies concerning the destruction of the property involved in this litigation, stated under oath that the cars in question were standing on tracks that were used by the Receiver (Rau Rec., 176); that no way-bill had ever been delivered by the Receiver to that Association of any of the cars, although it was an invariable custom to do so whenever a delivery was made; that the notices and directions in reference to the handling of the barley after it had reached East St. Louis, and while it was standing on these tracks, all passed between the consignees and the Receiver, they naturally concluded that the Receiver had the possession of their barley at the time it was lost, and accordingly intervened, as they were solicited by the Receiver to do, in the foreclosure suit.

Returning to the proposition that possession of this property having been proven to be in the Receiver, the burden was upon him to show by proof that was clear and satisfactory that he had delivered it to the Terminal

Association, let us briefly recur to what the testimony indisputably shows;

1. The Receiver had no terminal facilities at East St. Lous. He therefore contracted with the Terminal Association for the necessary yard room and track facilities and switch engines and crews for the handling of his cars, making and breaking up his trains that arrived at and departed from that place, *and for storage room for a reasonable number of cars not exceeding one hundred and fifty at any one time.* Under this agreement so much of tracks numbered from forty to fifty as was necessary to give the Receiver storage room for 150 cars was, quoting from the second subdivision of the contract, "set aside for the use of the party of the second part"—the Receiver. And these were the tracks that were commonly and usually used by the Receiver for handling and storing his cars, and upon which they stood until they were delivered to the Terminal Association by the switch engine of that Association taking them off these tracks and placing them in its portion of the yard. (Testimony of Roeder, Rau Rec., 76, 78; Felps, 81, 82, 95, 101; Lester, 188; Stapleton, 202; Calvert, 229, 232.) To identify these tracks they were marked red on a plat introduced in evidence. All the cars in controversy were at the time of the fire standing on some one or more of these tracks. (Rau Rec., 83, 84, 85.) *And it was stipulated by a written stipulation, signed by Receiver's counsel, that the cars in controvery at the time they were destroyed by fire were standing on the tracks that were commonly used by the Receiver under his agreement with the Terminal Association.* (Rau Rec., 115.) They were, therefore, in the Receiver's possession. The stipulation concedes this. They were placed there and were standing there in pur-

suance of the aforesaid agreement between the Receiver and the Terminal Association. The Receiver had the same right to have them switched there and stored there as though the tracks were his and the engine which placed them there was his, for he contracted and paid for this right, and so long as he occupied no more than the allotted room—150 cars—he could have stored these cars there until the right to do so ceased with the expiration of the contract. At the time of the fire there were, all told, but seventy of the Receiver's cars on these tracks. (Rau Rec., 177, 180.) So that the Receiver had room to spare. Now, how can it be reasonably urged that these cars were not as much in the physical possession of the Receiver as they would have been had he owned the tracks outright on which they stood and the engine which switched them there?

If they were, then it necessarily follows that the Terminal Association was not holding them at the time of the fire, and therefore the arrangement which counsel proposed to prove by certain absent witnesses, that it had agreed with the consignees to hold their cars on its ("*their*) tracks" and give them other facilities in its ("*their*) yards" had not yet become effective, for the cars were not in "*their yards*" or on "*their tracks*," but were on the tracks of the Receiver.

Let us recur to the statement which counsel made: It was that he *expected* to prove by certain witnesses that the Terminal Association had agreed to hold cars on "*their tracks*" at East St. Louis and offered other facilities in and about "*their yards*" at that place. Appellees' counsel admitted that if the witnesses were present they would testify substantially as counsel stated he *expected* they would testify. (Rau Rec., 261–262.) We at

that time had no thought, and not until it was argued in opposing counsel's brief on these appeals did it ever occur to us, that it could or would be contended that this informal stipulation, made in the hurry of and for the purpose of expediting a hearing, would or could be construed in such a manner as to cover cars *while they were yet standing and being held on tracks used by the Receiver, under his agreement with that Association*, and when they had not been way-billed to that Association. Especially when the Receiver's agent had, before this statement of counsel had been made, testified positively, and at the instance of counsel for Receiver, that these cars were held by the Receiver on these tracks on orders placed with him by the consignees to hold their barley. We supposed, and we submit any counsel would reasonably have supposed under like circumstances, that this statement of counsel related only to cars after they had been delivered by the Receiver to the Terminal Association in the usual and customary way in which deliveries were made at that place, so that it could be said that the cars were standing on "*their tracks*" in "*their yards.*" We did not suppose that it would or could be construed to apply to cars while they were standing on tracks which the Receiver was using under his agreement with that Association, made for no other purpose than to give him track and yard room for handling and storing *his* cars, or to cars while they were being held on such tracks on orders placed with the Receiver's agent by the consignees to hold their barley. (Rau Rec., 205.)

The holding of Circuit Judge Woods that the supposed arrangement between the consignees and the Terminal Association had become effective as to the cars of barley

in controversy, notwithstanding there had been no delivery of them by the Receiver to the Terminal Association and notwithstanding the Receiver still had the control and direction of them, and notwithstanding the Terminal Association had not up to the time they were destroyed knowledge of consignees, route, destination or contents of the cars, is, we submit, completely and conclusively answered by Circuit Judge Jenkins in his opinion. We quote from that opinion:

"It is held by the presiding judge that by reason of a certain supposed agreement between consignees in St. Louis and the Terminal Association—to the effect that the latter, as an inducement to barley dealers to ship over its lines, would hold cars containing shipments to such consignees on the tracks of the Terminal Association at East St. Louis—the receiver was absolved and liability under such agreement imposed upon the Terminal Association so soon as these cars had under the contract with the receiver been placed upon the tracks designated for the accommodation of the receiver's cars. I am unable to concur in this conclusion. I have sought to show that there had been no delivery of these cars to the Terminal Association. It had not knowledge of their destination. It had not knowledge of the consignees of them. They were subject to the direction and control of the receiver. The Terminal Association under its contract with the receiver had placed these cars upon these tracks for the receiver and for a compensation agreed upon. It therein was the agent of the receiver. It could not know whether these cars were to be transported over its line or the lines of the Wiggins Ferry Company; it could not know in what direction they were to be transported or their ultimate destination. When it had placed the cars on these tracks pursuant to its contract with the receiver it had nothing further to do with them until the receiver had dispossessed himself of possession and control and had invested the Terminal Association therewith. I cannot comprehend that the general agreement between the Terminal Association and consignees can become operative with respect to the contents of these cars until

delivery to the Terminal Association and it had been invested with the exclusive possession and the exclusive control of them. The force of the reasoning is not perceived whereby it is held that because in fact these goods were ultimately to go to persons who had contracted with the Terminal Association—of which contract the receiver had no knowledge—therefore these goods were held under that contract before delivery in fact to the Terminal Association and before it was invested with exclusive control of them. I do not undertake to say that the Terminal Association may not be liable to the receiver for its negligent acts causing the fire whereby this property was destroyed. Neither the question nor the party is before us. The question here is, whether the receiver is absolved from liability; whether, failing a delivery of the cars to the Terminal Association, failing a surrender by the receiver of control over them, with ignorance upon the part of the Terminal Association of their destination or their consignees, the agreement between the Terminal Association and the consignee had become operative with respect to these goods. I think not. If the receiver had directed that the Terminal Association under its contract with him should transfer these goods to the Wiggins Ferry Company, his order must have received recognition and have been carried out by the Terminal Association; and it cannot be doubted that up to the time of the fire in question the goods were so subject to the receiver's direction and control. For these reasons I think that the decrees appealed from should be affirmed."

2. That cars containing barley, after they were placed on these tracks and up to the time the Receiver had delivered to the Terminal Association the customary waybills for them, and that Association had taken them off these tracks and placed them in its portion of the yard, as testified by Felps (Rau Rec., 82), they were held by the Receiver under an arrangement between him and the consignees, and not between them and the Terminal Association, there is no doubt under the testimony. For the Receiver's chief clerk, Stapleton, who was in charge of this

business at East St. Louis under Calvert, the agent, testified, in response to questions asked of him by the Receiver's counsel, that after cars loaded with barley had been placed upon these tracks he would take the way-bills which came with the cars and notify the consignees that "*we*"—meaning the Receiver, not the Terminal Association—had a car, number so and so, loaded with barley, "Where do you want it?" and at such time as he—the consignee—got ready he would send the notice back, not to the Terminal Association, but to the Receiver's agent, to send the car to Hines' brewery, or Hiland or some other point. Thereupon he, Stapleton, would make out a new way-bill for the car, deliver it to Felps, the agent of the Terminal Association, and take his receipt. Now, why was this transaction? The following question and answer will explain:

Q. Was that a different and separate transaction, having reference to the original contract between the shipper and the Chicago, Milwaukee and St. Paul; *was it a new arrangement the consignee directed and controlled, or was it the original arrangement named by the shipper?*

A. *A new arrangement by the consignee, who placed orders with us to hold his barley.* (Stapleton's testimony, Rau Rec., 205.)

To the same effect is Calvert's testimony, Rau Rec., 235, 236, and Bosworth, Receiver, 248. Now, if it is to be presumed, as it is by the opinion of the presiding Judge, that Stapleton sent to the consignee notices that the cars containing the barley in question had arrived, and asked them where they wanted them sent, then it must also be presumed that such notices were sent in pursuance with the arrangement which Stapleton says the consignee had with him to hold their barley until further orders. If this is true, then it also follows that this par-

ticular barley was not held by the Terminal Association under any arrangement which it had with the consignee to hold barley, but was held by the Receiver under the arrangement which the consignee had with him to hold their barley.

That this correctly states the case there can be no doubt, for it fully consists with the conduct of the parties in reference to this barley while it was standing on these tracks before way-bills had been delivered therefor. For up to that time all transactions concerning it were had by the consignees with the Receiver; they treated the barley as in the Receiver's possession, and the Receiver regarded himself as having possession of it. The Receiver himself testified in response to a question asked by his counsel:

"Well, I would answer that by saying the St. Louis Terminal Association up to that point (meaning the time of the delivery of the way-bill) would not have recognized any order the consignee would have made directly to them, *and we would not have attempted to make a movement*, without the consignee, who would order through our agent in East St. Louis."

In view of such testimony and like testimony from his agent Calvert (Rec., 235, 236), and his chief clerk Stapleton (Rec., 205), that this barley while it was standing in cars on these tracks before the delivery of way-bills was held by the Receiver under an arrangement with the consignees, who placed orders with him to hold their barley for further orders, and that these further orders came directly to the Receiver from the consignees, except in occasional instances (Rau Rec., 207, 208) when they got into the hands of Mr. Roeder, a joint agent, who always turned them over to the Receiver's agent, how can it reasonably be contended that this barley was at the time

it was destroyed in the possession of the Terminal Association, or was held by it under some arrangement made with the consignees for holding their barley on its tracks. Especially when there had been no delivery of it to that Association, either actual or constructive, and when that Association could not know and did not know what the cars contained until they were delivered to it in the usual manner by delivering the customary way-bill. For, does not the testimony indisputably show that after the cars were placed on these tracks, and up to the time way-bills therefor were delivered to the Terminal Association, the Receiver held them on orders placed with his agent by the consignees to hold their barley for further orders.

Stated most favorably to the Receiver, the testimony which he in fact introduced in evidence, and the testimony which he stated he *expected* to introduce in evidence, proves, or tends to prove, that the consignees had an arrangement with both the Receiver and the Terminal Association for holding barley at East St. Louis. This testimony, if reconciled as it should be, can all be given effect, for it shows that the arrangement which the consignees had with the Receiver for holding their barley was intended to apply while it was standing on the tracks which the Receiver used between the time of its arrival at East St. Louis and the time when it was way-billed over to the Terminal Association; and that the arrangement they had with the Terminal Association to hold cars on "*their tracks*," and for other facilities in "*their yards*" applied to the cars of barley after they had come into the possession of that association in the usual and customary way, by the delivery of way-bills, and had been switched into "*their yard*" and were on "*their tracks;*" *or* to cars which the Receiver could not hold on his tracks by

reason of the limited space which he had contracted for being fully occupied by other of the Receiver's cars. For the Receiver had storage room for only 150 cars at a time, and it may well be presumed that at times he did not have sufficient space to store all the cars which the consignee desired held at East St. Louis under their arrangement with the Receiver, and they, therefore, made an arrangement with the Terminal Association to store such cars as the Receiver had not room for. Your Honors can very well see what is liable to confront these barley shippers if they shall be driven to sue the Terminal Association.

It is more reasonable, and certainly more in accord with the rules of evidence, to harmonize this testimony—all coming from the Receiver's witnesses—in this manner, than it is to eliminate from the case the testimony of Stapleton, Calvert and the Receiver himself, as would have to be done if the construction given by the presiding Judge to the testimony that Receiver's counsel stated he had expected to introduce, is adhered to. Unless this testimony can be reconciled, as we think it can and should be, then it is in serious conflict, and the conclusion necessarily follows that the burden of proof which was upon the Receiver to show by clear and satisfactory evidence that he had made a delivery of these cars and their contents before the loss occurred, has not been met. For the testimony of his witness Stapleton, that barley arriving at East St. Louis was held there by the Receiver up to the time it was way-billed out under "*a new arrangement by the consignee, who placed orders with us (the receiver) to hold his barley,*" as well as the testimony of Calvert and the Receiver, is absolutely inconsistent with the theory or claim that there had been a delivery of the

barley and cars in controversy to the Terminal Association.

While on the other hand, if the arrangement which counsel for Receiver expected to prove by certain witnesses, that the Terminal Association had agreed to hold cars of barley for the consignee in *its yards* at East St. Louis, is given the construction which is placed upon it by Circuit Judge Jenkins in his opinion, viz: that this arrangement was only intended to apply to cars loaded with barley, after there had been a delivery in accordance with the usual method of making deliveries of barley by the Receiver to the Terminal Association, and as explained by Felps (Rau Rec., 82, 86), so that the cars were, quoting from counsel's statement, "*on their tracks*," it is then not only consistent with the arrangement under which the Receiver and his witnesses, Calvert and Stapleton, say the barley was held between the time of its arrival and the delivery of way-bills therefor to the Terminal Association, but is consistent with the custom which all the testimony shows prevailed at East St. Louis, that as between the Receiver and the Terminal Association a car was never treated as delivered until the Receiver had delivered to the Terminal Association the customary way-bill, containing the name of the consignor, consignee, destination, route, number and contents of the car. And a way-bill was never delivered to that Association by the Receiver for any car loaded with barley until the consignee notified the Receiver to do so. And further, until the way-bill for a car had been delivered, and not before, did the Receiver notify the company whose car he had so delivered, had been delivered. This is significant. For it shows in whose possession the car was up to the time that the way-bill therefor was delivered.

This interpretation of the testimony is likewise consistent with the construction which, we contend, should be given the contract under which the Receiver used the tracks of the Terminal Association, viz: that while his cars were standing upon the tracks which he contracted and paid for the use of, they were in his possession as much so as if he had owned the tracks absolutely.

And further, such interpretation is consistent with the stipulation of the parties, that the cars in controversy at the time of the fire were standing on the tracks which the Receiver had the use of under his agreement with the Terminal Association. (Rau Rec., 115.) This fact is likewise significant, for it shows conclusively that the very cars in controversy were in the Receiver's possession at the time of the fire, for they were at that time, and had been, ever since their arrival at East St. Louis, standing on the tracks which the Receiver had the use of under his agreement. This agreement took the place of ownership, and possession under it was the same as possession with ownership.

We therefore most respectfully but earnestly request this court to order these cases to be certified to this court for final determination. We feel that a wrong conclusion has been reached, that a wrong construction has been given to the statement of counsel for Receiver as to what he expected to prove by certain witnesses—a construction that was not intended by the parties, a construction that petitioners should not be bound by in view of the testimony of witnesses for the Receiver, that the consignees had arranged with the Receiver to hold their barley upon its arrival at East St. Louis until further orders, and of the stipulation of the parties that the particular cars in controversy were at the time of the fire standing on

the tracks which the Receiver had the use of under his agreement with the Terminal Assseiation, a construction which raises a serious conflict between the testimony which counsel stated he expected to introduce, and the testimony of Stapleton, Calvert and Bosworth, which he did introduce in evidence, a construction which is far beyond that which petitioners' counsel ought reasonably to have expected in view of the testimony, which Receiver's counsel had introduced prior to the making of that statement, in reference to the arrangement which the consignees had with the Receiver for holding this barley, and the custom which all the testimony shows prevailed at East St. Louis, that a car loaded with barley, while standing on the Receiver's tracks, was never treated by the Receiver as delivered to the Terminal Association until his agent had delivered a way-bill for the car, taken the usual receipt therefor and the car switched from his portion of the yard. We feel also that Circuit Judges Woods and Showalter, in the consideration of these cases, have overlooked the well established rule of law, that when possession of property is once proven to be in a carrier, the presumption is that such possession continues until it is shown to be elsewhere: and that the burden is upon the carrier to show by a preponderance of proof—proof that is clear and satisfactory, not conflicting or as consistent with non-delivery as with delivery—that there has been a delivery of the possession either to the consignee or the succeeding carrier, whichever the case may be. This proof, we submit, is not present in these cases. For if the construction which we are contending for is not to be given to the statement of counsel, then it is at war with the testimony of his other witnesses Stapleton, Calvert and Bosworth, as well as with

nearly all the other testimony in the case which relates to the holding and delivery of cars loaded with barley at East St. Louis. A carrier upon whom the burden of proof rests to show delivery of property to a connecting carrier, especially in a suit by the owner to recover its value in case of loss, cannot and ought not to discharge that burden by testimony that is conflicting or is susceptible of two or more constructions, or is as consistent with non-delivery as with delivery. Such is the case here—if the construstion which the presiding Judge has given to counsel's statement is to prevail.

3. It is assumed by the presiding Judge that the Receiver's agents at East St. Louis had sent to the consignees the usual notice of the arrival of the cars of barley in question. There is no proof to sustain this presumption, and the master found that no notice had been sent by the Receiver's agent to the consignee. (Rau Rec., 67.) But conceding this to be true, then the other presumption inevitably follows, that such notice was sent in pursuance of the arrangement which Stapleton testified was "*a new arrangement by the consignee who placed orders with us to hold his barley.*" (Rau Rec., 205.) This leaves no room for the contention that this particular barley at the time it was destroyed was being held by the Terminal Association under an arrangement with the consignee. For the fact that the Receiver's agent sent notices to the consignees that he had certain cars loaded with barley consigned to them, giving the number of the cars in controversy, asking them where they wanted them sent, and that this was done in pursuance of an arrangement between him and the consignees to hold their barley on their orders, placed with him, shows conclusively that the particular barley in question at the time it was de-

stroyed was being held by the Receiver under his arrangement with the consignees to hold it, and not by the Terminal Association under is arrangement with the consignees. The presumption that the customary notices covering the particular cars of barley in controversy were sent by the Receiver's agent to the consignees, and that such notices were sent in pursuance of "*a new arrangement the consignee directed and controlled*"—"*a new arrangement by the consignee, who placed orders with us* (the Receiver) *to hold his barley*" (Rau Rec., 205), precludes the claim that the barley in question was being held under any other arrangement than that testified to by the Receiver's witnesses.

We, therefore, respectfully submit that a wrong construction has been given the statement of counsel for Receiver, and a value attached to it that is not warranted by the testimony, which the Receiver himself introduced. Either this is true, or the testimony which counsel expected to introduce is wholly inconsistent with the testimony which he did in fact introduce, in which event we contend that the burden of proof which was cast upon the Receiver was not met, and for that reason the conclusions of Circuit Judges Woods and Showalter are erroneous.

III.

CLAIM FOR CARS DESTROYED.

This claim rests on somewhat different grounds than do the claims for barley destroyed. Commercial necessities require that cars engaged in the freight carrying business of the country shall be exchanged between the various railway companies. This gives rise to a

system of car bookkeeping between the companies, and the necessity for the rule, which all companies recognize and act under, that each company, upon making a delivery of a car, not its own, to a connecting line shall report such delivery to the company owning the car, giving the number of the car, date of delivery and the company to which it has been delivered, and that until such delivery is so reported the car shall stand charged to the company last reported as having received it; and if destroyed while on the tracks of that company, such company shall be liable therefor the same as it would be for any other property which it might have in its possession for transportation or delivery.

That this system of car bookkeeping and rule of liability prevailed between the Receiver's company and the Chicago, Milwaukee and St. Paul Railway Company, there is no question under the testimony. Calvert, the Receiver's agent at East St. Louis, and Bradley, his car accountant, testified, as did Beecham, the car accountant of the St. Paul Company, to this system. (Rau Rec., 97, 99, 104, 101, 154.) The rule of liability for damaged or destroyed cars was testified to by both Mr. Beecham and Bosworth, the Receiver.

Mr. Beecham:

Q. Are you acquainted with the practice and custom which prevailed among the different railroads of the United States in respect to the settlement or payment for cars damaged or destroyed when in possession of companies not owning the cars?

A. Yes, sir.

Q. You may state what the practice or custom is.

A. The practice is for the company, through its master car-builder, for the companies on whose track the car is destroyed, to report such destruction to the owner of the car and to call for a history of the car, showing when

it was built, and then they deduct a depreciation and salvage and settle direct with the owners of the car if they so elect, but they may—it is optional with them to rebuild the car.

Q. So the company in whose possession the foreign car is, in case that car is damaged or destroyed, either rebuilds the car or pays the company owning it?

A. That is the universal practice.

Q. Is that the way all settlements are made between different companies with respect to damaged and destroyed cars?

A. Yes, sir; it is.

Q. So that a car of the Chicago, Milwaukee and St. Paul Railway Company, while in possession of the Chicago, Peoria and St. Louis Railway Company, if damage or destroyed, the latter company would pay the St. Paul Company for it or rebuild the car?

A. Yes, sir.

Q, You say that is the custom and practice on which all settlements are made between the different companies?

A. Uniform practice and custom. (Rau Rec., 142.)

Mr. Bosworth:

Q. It is a custom between all railroads, if a car of the St Paul Railway is destroyed on your track, that you pay for it?

A. Yes, sir.

Q. And that is on the ground that you have possession of the car, and in accounting for the loss of it you account to the owner and pay for it; that is a well understood custom, isn't it?

A. Yes, sir.

In this connection, it should be stated that in pursuance of the custom which Mr. Beecham and Mr. Bosworth testified to, Mr. Bradley, the Receiver's car accountant, reported to Mr. Beecham under date of November 2, 1894, four days after the fire, the cars which had been destroyed by the fire belonging to the St. Paul Company. (Rau Rec., 129, 130.) This is significant, for it shows that the car accountant regarded these cars as in the possession of

the Receiver at the time they were destroyed and accordingly reported their loss to the car accountant of the St. Paul Company.

There is likewise no dispute in the testimony concerning the possession of the particular cars in controversy. At the commencement of the taking of testimony it was formally agreed between the parties, by written stipulation signed and filed, that the thirty-eight cars in controversy were at the time of the fire standing on the tracks which the Receiver commonly used under his agreement with the Terminal Association. (Rau Rec., 115.) This puts at rest all questions concerning the actual possession of these cars. It should also be borne in mind that they were not standing on these tracks for unloading there, but were awaiting orders for their further movement; the case, therefore, is not one where cars have been set on a private side-track of the consignee for unloading, in which event it might well be said they were not in the carrier's possession; but here they were in the Receiver's possession, on his tracks, awaiting further transportation. Besides this, it was an invariable rule for the Receiver to deliver to the Terminal Association a way-bill for every car delivered to that Association. No way-bill had been passed for any of the cars in controversy; no junction report had been sent to or received by the St. Paul Company for any of the cars. (Rau Rec., 100.) They all stood charged on the books of that company as being in the possession of the Receiver's company.

Mr. Beecham testified:

Q. In whose possession were these cars I have spoken of—these thirty-eight cars—who were they charged to?

A. Chicago, Peoria and St. Louis Railroad. (Rau Rec., 103.)

The case, therefore, comes to this: That as between the Receiver's company and the St. Paul company, these cars were in the possession of the former company, and under the custom which had been established by long continued practice between the companies, it is liable for their value. If custom is to be considered in determining the liability for the contents of the cars, it should likewise be considered in respect to the cars themselves. And we submit that the testimony indisputably shows that the Receiver's company was a party to a custom or practice that fastens upon it a liability for these cars, and that it cannot evade that liability by showing that the consignees of the barley had arrangements with the Terminal Association for holding cars or giving them other facilities in its yards. Whether the Receiver's company knew of this arrangement is immaterial, so far as the rights of the St. Paul company are involved. It did know that these cars were on tracks which it had the use of, and that they were charged to it as being in its possession on the books of the St. Paul company. It, therefore, knew that under the rules and custom governing the exchange of cars between the various railway companies, that its liability for these cars would continue until it had made a delivery of them in the usual way that deliveries of cars were made at that place and such delivery reported to the St. Paul company. Such delivery not having been made or reported and the cars at the time of the fire being on tracks which the Receiver's company used under its agreement with the Terminal Association to give it facilities for handling and storing cars, it conclusively follows that the liability for these cars is with that company and not with the Terminal Association.

So far as the courts have had occasion to consider this

question, they have held that a railway company is liable for the safe carriage and return of cars belonging to other companies which come into its possession in the usual course of business, the same as it is for any other property which it handles as a carrier or as a warehouseman. So long as cars of one company are in the possession of another company, that company is accountable for them as a carrier or as a warehouseman. If they have been set on a private delivery track belonging to the consignee, for loading or unloading, then they are not in the possession of the carrier, and consequently its liability is interrupted during the time they are so out of its possession (*Railway Co.* v. *Ry. Co.*, 123 Ill., 594); but if they are placed on the carrier's tracks for loading and unloading, the rule is different, and they will be regarded as in the possession of the carrier, its liability being that of a warehouseman only. (*Ry. Co.* v. *Rolling Stock Co.*, 136 Ill., 644.) We, therefore, come back to the question: Were these cars, as between the Receiver's company and the St. Paul company, in the possession of the former company at the time they were destroyed? If they were, then it is liable therefor, both under the rule of liability, which a long-continued practice and custom had created, and the decisions of the courts. We submit that, under the second subdivision of the stipulation of August 27, 1895 (Rau Rec., 115), and the rules and custom which prevailed between the two companies, under which deliveries of cars were made and reported and the accounts thereof kept, there can be no doubt as to where the possession of these cars was at the time they were destroyed, or of the Receiver's liability.

The following cases bear upon this question:

Ry. Co. v. *Ry. Co.*, 109 Ill., 135.

Ry. Co. v. *Ry. Co.*, 123 Ill., 594.
R. R. Co. v. *R. R. Co.*, 14 Allen, 462.
Ry. Co. v. *Rolling Stock Co.*, 136 Ill., 649.
Malory v. *Ry. Co.*, 39 Barb., 488.

IV.

In conclusion, it can but be said that this case could not be better stated in all its phases than is done in the dissenting opinion by Circuit Judge Jenkins, and it is urged upon this court to carefully examine and consider that opinion. It is in harmony with the case as presented by the record, it is in harmony with the succinct and able report of the Master and the decrees entered thereon by Judge Allen at the Circuit, it is in harmony with the decisions of this and other courts, it is in harmony with the manifest justice of the case. The opinions of Circuit Judges Woods and Showalter are not only opposed to each other, but they are inconsistent with the decisions of this Honorable Court, especially in the cases of *Pratt* v. *Ry. Co.*, 95 U.S., 43, and the Covington Stockyard case, 139 U. S., 128, and the decision of the United States Circuit Court of Appeals for the Second Circuit in *Texas & Pacific Ry. Co.* v. *Clayton*, 51 U. S. App. 676, and with the decisions of the state courts as announced in *Mount Vernon Co.* v. *Ala. G. S. Ry. Co.*, 92 Ala., 296, 298; *Palmer* v. *C. B. & Q. Ry. Co.*, 13 Atl. Rep., 818; *Ins. Co.* v. *Ry. Co.*, 55 Tenn. Repts., 268. They are not therefore entitled to any strong presumption of correctness. They leave the question of law involved in a state of grave and serious uncertainty, and the petitioners in the predicament that one Bromley was left, after a litiga-

tion lasting several years over the loss of his portmanteau —he had neither portmanteau nor a right of action against either carrier for its recovery. *Midland Ry. Co.* v. *Bromley*, 8 J. Scott, 372 (84 E. C. L. 372, 382, note a).

To prevent the uncertainty in the law that will be occasioned if the decisions rendered by Judges Woods and Showalter are allowed to stand, this court is respectfully urged to grant writs of certiorari, requiring these cases to be sent here for review and final determination.

All of which is respectfully submitted.

GEORGE R. PECK,
BURTON HANSON,
Counsel for Petitioners.

Explainatory Note:

Refererence is made to the record in the Rau case only, for the reason that the record in the cases of the Chicago, Milwaukee and St. Paul Railway Company and the Huntting Elevator Company are the same as in the Rau case.



Nos 282, 283 & 285
11-12 & 13

MAR 6 1899
JAMES H. McKENNEY,
Clerk

Brief of Peck, in the Cary v Hanson

Supreme Court of the United States.

OCTOBER TERM, A. D. 1898.

Petitioners.

Filed March 6, 1899

THE HUNTTING ELEVATOR COMPANY, *Petitioner*, } No. 285.

THE HUNTTING ELEVATOR COMPANY, *Petitioner*, } No. 284.

CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, *Petitioner*, } No. 283.

vs.

C. H. BOSWORTH, Receiver of the Chicago, Peoria & St. Louis Railway Company.

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF AND ARGUMENT FOR PETITIONERS.

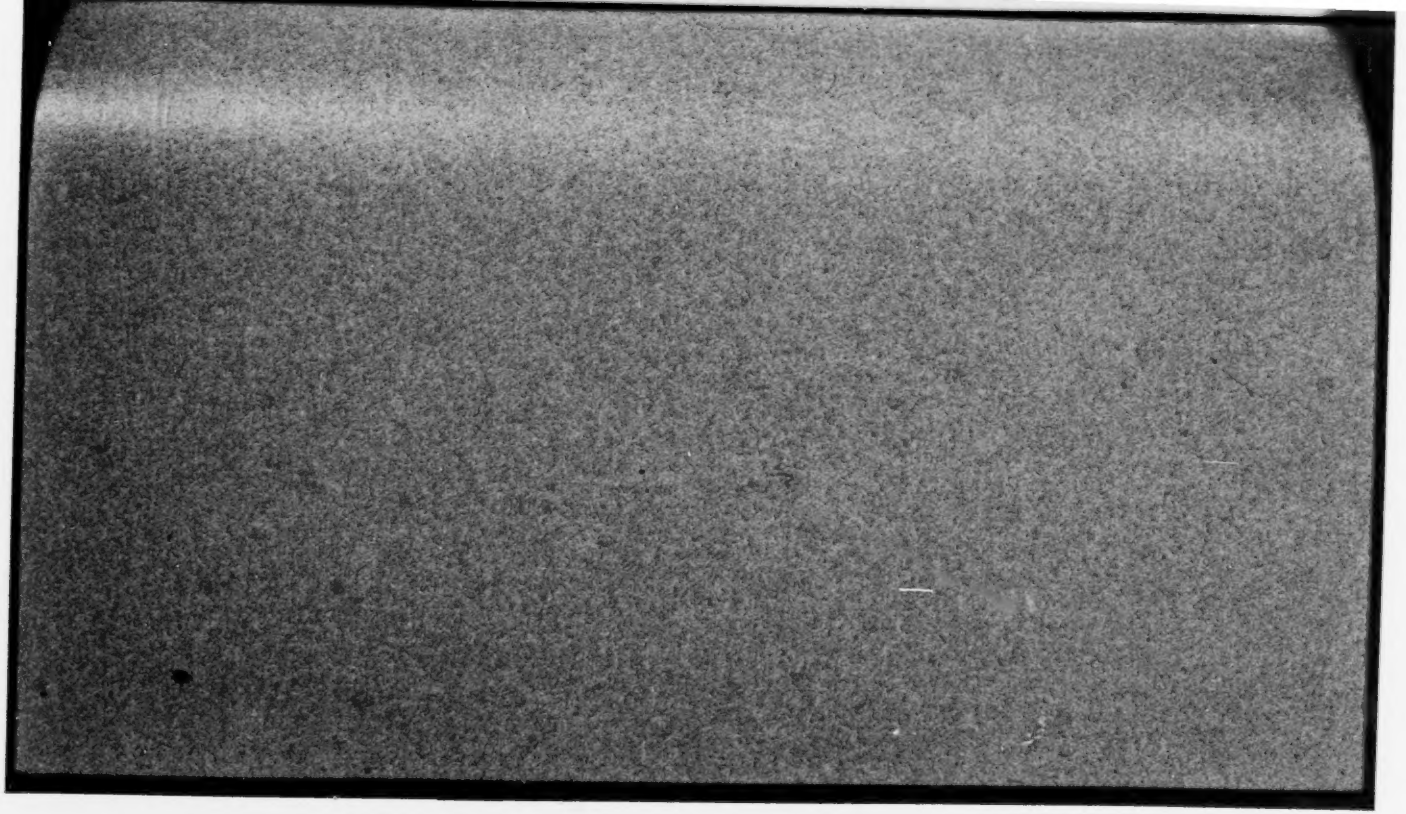
GEORGE R. PECK,
GEORGE P. CARY,
SOLICITORS FOR PETITIONERS.

BURTON HANSON,
OF COUNSEL.

EXPLANATORY NOTE.

Reference is made to the Record in the Rau case only, for the reason that the Record in the cases of the Huntting Elevator Company and the Chicago, Milwaukee & St. Paul Railway Company are the same as in that case.

The Gunthorp-Warren Printing Company, 63 Dearborn St., Chicago.



IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1898.

JACOB RAU, *Petitioner,* — No. 285.

THE HUNTTING ELEVATOR COMPANY, *Petitioner,* — No. 284.

CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, *Petitioner,* — No. 283.

vs.

C. H. BOSWORTH, Receiver of the Chicago, Peoria & St. Louis Railway Company.

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

STATEMENT OF THE CASE.

On the evening of the 28th day of October, 1894, fifty-nine cars and their contents were either damaged or destroyed by fire at East St. Louis, in the State of Illinois, while, as petitioners claim, they were in the possession of the Receiver of the Chicago, Peoria and St. Louis Railway Company. Fifty-four of these cars belonged to the Chicago, Milwaukee and St. Paul Railway Company, thirty-eight of which were wholly destroyed—the amount

of the damage being, as stipulated between the parties, $9,033.73. The remaining sixteen cars were repaired by the Receiver and no claim for damage is made as to them. These proceedings were instituted for the purpose of recovering the value of the thirty-eight cars which were destroyed and the value of the contents (which was barley) of the whole fifty-nine cars.

The petitioners base their right to recover on the ground that the cars and the barley they contained at the time they were destroyed by fire were in the possession of the Receiver and that he negligently allowed them to stand or be stored on tracks near by a long wooden warehouse that was filled with loose hay through and into which locomotive engines were constantly pasing and repassing, which warehouse taking fire was itself consumed, along with said cars and their contents. (Rau Rec., 20, 22, 43.) *This warehouse is characterized by the Receiver in his answer as "a veritable fire trap."* (Rau Rec., 23.)

The matters in dispute were referred to Mr. Stuart Brown, one of the masters in chancery of the United States Circuit Court for the Southern District of Illinois, and after hearing the proof and arguments of the parties, he reported in favor of the petitioners. *For his reports, see Rau Record, pp. 53–63; Huntting Elevator Record, pp. 5 and 6; Chicago, Milwaukee and St. Paul Railway Company Record, pp. 5 and 6.* Subsequently the proceedings came before the court upon exceptions taken by the Receiver to the reports of the master, and the exceptions were overruled, the reports confirmed and decrees entered thereon in favor of the petitioners, as follows:

1.	Chicago, Milwaukee and St. Paul Railway Company	$9,033 73
2.	S. Y. Hyde Elevator Company	2,154 53
3.	Huntting Elevator Company	2,600 95
4.	Thomas McMichael & Son	3,169 24
5.	W. W. Cargill Company	1,253 23
6.	Jacob Rau	1,144 07
7.	Henry Rippe	1,165 67
8.	Gilchrist & Co	805 00

Appeals from these decrees were taken by the Receiver to the United States Circuit Court of Appeals for the Seventh Circuit, whereupon the decrees were reversed and the causes remanded with directions in each case to dismiss the petition, Circuit Judge Jenkins dissenting, and Circuit Judges Woods and Showalter each disagreeing with the other as to the reasons upon which the reversals were ordered. The cause is reported in 30 U. S. Cir. Ct. App., 541. Thereupon petitioners made application to this court for writs of *certiorari*, which were granted. By agreement of the parties, the decrees in favor of the S. Y. Hyde Elevator Company, Thomas McMichael & Son, W. W. Cargill Company, Henry Rippe, and Gilchrist & Co. abide the result of the Rau and Huntting Elevator Company cases. The only respect in which the Rau and the Huntting Elevator cases differ is that the ownership of the barley is conceded in the former and denied in the latter.

The claims in both the Rau and Huntting Elevator Company cases arise out of the destruction of a large quantity of barley by fire at East St. Louis, while in transit, which barley was consigned from points in Iowa, Wisconsin and Minnesota to St. Louis, Missouri, by way of East St. Louis. THE DESTINATION OF ALL

THE BARLEY SHIPMENTS WAS ST. LOUIS, MISSOURI. *This was agreed upon by a written stipulation of the parties.* (Rec., 31-34.)

The claim of the Chicago, Milwaukee and St. Paul Railway Company arises out of the destruction by the same fire of thirty-eight box freight cars in which the barley above mentioned was being transported at the time it was destroyed.

As the cases are now presented to this court, the principal question involved is: Were the cars and their contents at the time they were destroyed in the possession of the Receiver of the Chicago, Peoria and St. Louis Railway Company, or had they been delivered by him to the next succeeding carrier, the Terminal Railroad Association of St. Louis? The petitioners claim that they had not been so delivered, but were in the possession of the Receiver, while the Receiver contends that he had made a delivery of them to that association before the fire had occurred. The master to whom the cases were referred, District Judge Allen, who presided at the Circuit, and Circuit Judge Jenkins, sitting in the Circuit Court of Appeals, held that there had been no delivery of the cars by the Receiver to the Terminal Association, and that he was liable for their value and contents, while Circuit Judges Woods and Showalter held that there had been a delivery of the cars by the Receiver to the Terminal Association, but each disagreed with the other as to the reasons therefor.

The case presented by the record is this: The barley in question was delivered to the Chicago, Milwaukee and St. Paul Railway Company in cars of that company at various points in Iowa, Wisconsin and Minnesota consigned to commission houses at St. Louis, Missouri, by

way of East St. Louis. In due course of transportation, the cars and their contents were delivered to Bosworth as Receiver of the Chicago, Peoria and St. Louis Railway Company at Peoria, Ill. This company operated a line of railroad from that place to East St. Louis in Illinois. The cars were transported by the Receiver's company to East St. Louis, the terminus of that line of railroad, and there with their contents were destroyed by fire as above stated. Having no terminal facilities whatever of its own at East St. Louis, the Receiver entered into a contract with the Terminal Railroad Association of St Louis whereby that association undertook and agreed to furnish him necessary yard room, track facilities, switch engines and cars for handling his business, making and breaking up his trains that arrived at and departed from that place, *and storage room for a reasonable number of cars, not exceeding 150 at any one time.* Under this arrangement, so much of tracks numbered from 40 to 50 as was necessary to give the Receiver storage room for that number of cars, was set aside for his use. (Rau Rec., 70, 74, 75, 76, 77.) The agreement will be found on page 100 of the record. These tracks were the tracks that were commonly and usually used by the Receiver for handling and storing his cars and upon which they were placed upon their arrival at East St. Louis, *and where they remained standing until they were delivered to the Terminal Association for further transportation*, or some other disposition had been made of them. (Rec., 70, 73, 74, 77, 187, and stipulation, subdivision 2, Rec., 103, 104.) AND THESE WERE THE TRACKS UPON WHICH THE CARS IN CONTROVERSY WERE STANDING AT THE TIME THEY AND THEIR CONTENTS WERE DESTROYED BY FIRE. (Rec., 74-77, and subdivision 2, stipulation, Rec., 103, 104.)

The practice under this agreement was that upon the arrival at East St. Louis of the Receiver's trains, they would come to a stop at the end of his track, and there they would stand until a switch engine of the Terminal Association would hitch to them and switch them to some one or more of the ten tracks which the Receiver had the use of under his agreement with that association. For this service the Receiver paid the Terminal Association fifty cents a car. After having been switched to these tracks, the cars would remain there until the Receiver gave directions to the Terminal Association for their further movement or transportation, if the cars were to be further transported by that association. If they were destined to St. Louis or to points beyond, by way of the Terminal Association, the Receiver would make out a manifest, called a way-bill, which contained on its face the name of the consignor and consignee, the route and destination and number, name and contents of the car, and deliver that to the agent of the Terminal Association and take his receipt therefor. Thereupon, *and not until then*, the switching crew of the Terminal Association would take the way-bill, take the cars named therein out of the Receiver's portion of the yard, and place them in its portion of the yard, put them in a train and take then to the destination indicated in such way-bill. If the cars were routed by some other line than that of the Terminal Association, such as the Wiggin's Ferry, a competing line, they would be switched by the Terminal Association from the tracks which the Receiver used under this agreement with that association, to the tracks of the Ferry Company. This service was performed under the agreement with the Terminal Association. (*See fourth subdivision of the agreement.*) The

manner in which the Receiver's cars were handled after their arrival at East St. Louis is probably best told by the witnesses themselves. They are George H. Felps, agent of the Terminal Association; W. H. Calvert, agent of the Receiver at East St. Louis, and E. R. Stapleton, his clerk, and the Receiver himself.

Geo. H. Felps testified as follows:

Q. What company breaks up this train and places the cars on the tracks marked red?

A. The Terminal Railroad Association.

Q. That done under the agreement introduced here?

A. Yes, sir; at a certain sum per car.

Q. What sum?

A. Fifty cents a car.

Q. When that train is broken up, as you have stated, and the cars set on the tracks marked red, what is then done with these cars?

A. We are done with the cars then until we get way-bills from the agent of the C. P. & St. L.

Q. From the Receiver?

A. Yes, sir; from the agent of the Receiver.

Q. What is a way-bill?

A. A manifest showing what disposition is to be made of the freight.

Q. When you receive the way-bill of a car what do you do then?

A. Card that car out, and our yardmen are instructed to switch it out and deliver it according to the instructions.

Q. Does the way-bill contain the number of the car and destination?

A. Yes, sir; consignee, destination and route.

Q. *When you receive this way-bill and switch the car out, where do you take it?*

A. *Take the car out of their yard—their portion of the yard, and place it in the train in our portion of the yard and take it to the connection or destination indicated.* (Rau., Rec, 74, 75.)

And further, at page 78, he testified:

Q. What was the custom in respect to handling these

cars set out on these tracks, after they had been set there, on the part of the Terminal Association?

A. *We had nothing to do with them at all until we received way-bills, if they stood there till doomsday.*

E. R. Stapleton, witness for Receiver, testified as follows:

Direct Examination.

Q. A train comes in on this "Y"—what is then done with it by the Receiver, if anything?

A. The trains stop on the "Y" and the Receiver is done with them.

Q. Is that true?

A. Yes, sir; the Receiver does not handle the cars or control their handling in a *direct* way after that. (Rau Rec., 184.)

Cross-Examination.

Q. The major asked if the Receiver was done with them, so far as handling the cars?

A. So far as the handling of the cars.

Q. *The Receiver did have something else to do with them with reference to sending them on to St. Louis in the way of giving way-bills?*

A. Yes, sir; giving way-bills.

Q. When those way-bills are made out by the agent at East St. Louis they are delivered to the Terminal Association?

A. And their receipt taken.

Q. Of the way-bill?

A. Yes, sir.

Q. So you would have the receipt of every way bill delivered?

A. Yes, sir.

Q. Then the Terminal Association would take these cars according to the direction on the way-bill?

A. Yes, sir. (Rau Rec., 188, 189.)

W. H. Calvert, a witness for Receiver, testified as follows:

Q. When way-bills were made out by the Receiver at

East St. Louis for barley consigned to St. Louis and other points to which the Terminal Association was to take it, where were the way-bills made out—at your office?

A. Yes, sir.

Q. That would be way-bills of all cars going to some other points than East St. Louis?

A. Yes, sir; except such as were to go to Wiggins Ferry, in which case the way-bills would be delivered to the Wiggins Ferry. (Rau Rec., 234.)

C. H. Bosworth, the Receiver, testified as follows:

Q. Isn't it a universal custom whenever there is a car delivered from one company to another, consigned to a point beyond, before that car is taken by the company to which it is delivered and moved on to its destination, a way-bill accompanies that car and is delivered to the receiving company?

A. I can't say it is a universal custom.

Q. How would the receiving company know what to do with a car without a way-bill?

A. Might take the directions of the agent; *I will state it is undoubtedly generally the case.* (Rau Rec., 227.)

The Receiver also testified that until the Terminal Association received a way-bill it would not undertake to move any of his cars, excepting to switch them from his main track to the tracks which he used under the agreement with that association, and that until his agents delivered way-bills to the Terminal Association, the cars were subject to his (the Receiver's) orders. (Rau Rec., 228.)

NO WAY-BILL HAD BEEN DELIVERED TO THE TERMINAL ASSOCIATION FOR ANY OF THE CARS IN CONTROVERSY. (Rau Rec., 78, 96, 133.) Indeed, it is not claimed by the Receiver that he had delivered a way-bill to the Terminal Association for any of the cars in question

The testimony also shows, and it is undisputed, that at

East St. Louis whenever the Receiver delivered a car of any other than his own company to the Terminal Association, immediately upon such delivery being made he would send by mail a written notice called a junction report, to the company whose car was delivered, notifying it of the delivery, so that the car delivered would be credited to him and charged to the Terminal Association. For illustration: Whenever the Receiver delivered a car belonging to the Chicago, Milwaukee and St. Paul Railway Company to the Terminal Association he would immediately, on the very day of the delivery of the car, send a junction report to the car accountant of that company notifying him of the delivery of such car to the Terminal Association; thereupon the car so delivered would be credited to the Receiver as having been delivered to the Terminal Association and charged to that association. This is the custon at all junction points and is adopted by the railways of the country in order to enable them to know the whereabouts of their cars and to fix the responsibility of the company having the possession of them in the event of loss or damage. NO JUNCTION REPORT HAD BEEN SENT BY THE RECEIVER TO THE CHICAGO, MILWAUKEE AND ST. PAUL RAILWAY COMPANY FOR ANY OF THE CARS IN CONTROVERSY. (Rau Rec., 80, 81, 82, 87, to 93, 138, 139, 140, 227.)

It further appears from the record that under the custom which existed at East St. Louis in reference to handling the barley business of the Receiver, after cars containing barley had been placed upon the tracks which the Receiver had the use of under his agreement with the Terminal Association, his agent would take the way-bills which had come into East St. Louis with the cars and under which the cars had been transported over his line

of road, which way-bills contained on their face the name of the consignor, consignee, number, destination and contents of the car, and notify "*the consignee that we (the Receiver) had a car No. so and so, loaded with barley; where do you want it?*" (Rau Rec., 190.) In due time, this notice which the *Receiver's agent* had sent to the consignee, the consignee would send back to the *Receiver's agent* endorsed on the back with directions where the car should be sent. *This was done under an arrangement between the consignees of this barley and the Receiver, that he would hold their barley at East St. Louis subject to their order*—so the Receiver's agent testified:

Q. Was that a different and separate transaction having reference to the original contract between the shippers and the C., M. & St. P.? *Was it a new arrangement the consignee directed and controlled*, or was it the original arrangement named by the shipper?

A. *A new arrangement by the consignee who placed orders with* us *to hold his barley.* (Rau Rec., 190.)

Upon receiving directions from the consignee the Receiver's agent would make out a way-bill containing the name of the consignee, the destination, number and contents of the car, take it to the agent of the Terminal Association, deliver it to him and take his receipt. Until this way-bill was received the Terminal Association of course had no knowledge concerning these cars further than it had switched them from the main line of the Receiver's road to the tracks which he had the use of under the aforesaid agreement, and had earned in consequence a certain amount, depending on the number of cars switched. It did not and could not know until this way-bill was received that the cars of the Receiver standing on such tracks contained barley, nor what they contained, or that they were destined to St. Louis, or to some other point,

and if so, where or to whom, or by what route they were consigned. Upon the receipt of this way-bill from the Receiver's agent the agent of the Terminal Association would give directions to the switching crew, and they would take the car named in the way-bill out of the Receiver's portion of the yard and place it in the Terminal Association's portion of the yard, put it into a train, and then take it to the destination or connection indicated in the way-bill. (Rau Rec., 74.)

It further appears from the record that the Receiver made no proof of having ever sent to the consignees of the barley in question the usual and customary notice of the arrival of any of the cars in controversy, and so far as the record shows, no notice was given by the Receiver to the consignees of the arrival of the barley at East St. Louis.

The master to whom these causes were referred found as a fact that no notice of the arrival of the barley at East St. Louis had been given to the consignees, as it was the custom to do; that no way-bill had been delivered by the Receiver to the Terminal Association for any of the cars in controversy, as it was the custom to do when a car was delivered to that Association, and that no junction report had been sent by the Receiver to the Chicago, Milwaukee and St. Paul Railway Company, as it was the custom to do when a car of that Company had been delivered to the Terminal Association. (Rau Rec., 54, 61; Huntting Elevator Co. Rec., 12, 13; C., M. & St. P. Ry. Co. Rec., 5.)

It further appears from the record that after the fire had occurred the Receiver presented proofs of loss to the insurance companies in which he held policies, and that Calvert, his agent at East St. Louis, by his direction prepared a sworn statement showing the cars and the

value of their contents which were destroyed by fire, and that he, the Receiver, presented that statement to the insurance companies for the purpose of collecting the insurance thereon, and so far as the record shows did collect such insurance. The proofs of loss, among other things, contained the following:

"During the night of October 28, 1894, a fire occurred on the tracks of the Terminal Railway Association at East St. Louis, State of Illinois (*said tracks being used by the Chicago, Peoria and St. Louis Railway Company*), and burned the cars and wholly consumed the property and freight in transit in said cars, as set forth in the statement attached hereto and forming a part of this proof of loss." (Rec., 88, 98, 163, 164.)

This statement shows, as does the whole testimony, that these cars, instead of having been delivered to the Terminal Association, were at the time the fire occurred upon the tracks used by the Receiver, and as between him and the petitioners were his tracks; consequently the cars were in his possession while they were standing thereon, especially when no way-bill had been delivered by the Receiver to the Terminal Association for any of such cars, as was the custom whenever a delivery of cars was made to that association.

After the foregoing facts had been shown in evidence, counsel for Receiver stated that he had not been able to obtain the testimony of the consignees, as he had expected, and therefore asked for further time, stating *that he expected* to prove by them that the Terminal Association as an inducement to the consignees to ship their barley by that route, agreed to hold the cars containing barley free of car service charges *upon its tracks* at East St. Louis. To avoid further delay, counsel for petitioners admitted that if the persons named were present

they would testify substantially as counsel *stated he expected they would testify.* (Rau Rec., 238–241.) It is apparent that the admission of counsel was made upon the assumption that this arrangement, if it existed, became operative only *after* the cars had been delivered into the possession of the Terminal Association, so that they could be said to be on *its* tracks and in *its* yards, and that delivery could not be said to have been made until the agent of the Receiver had delivered to the agent of the Terminal Association the customary way-bill, containing the names of the consignor and consignee, the route and destination, and the number and contents of the car, and taken the receipt therefor, as it was the custom to do. For until this had been done the Receiver had not parted with either the possession or control of the cars, and the Terminal Association could not know which of the cars that were standing on the tracks which the Receiver used were routed over its tracks, and if so, what they contained, where they were destined or to whom consigned; and until this information is received the Terminal Association would not as a matter of course accept delivery. And such delivery not having been made of any of the cars in controversy the arrangement which counsel stated he *expected* to prove had no application to this case.

Rulings of the Court Below.

Judge Showalter in his opinion holds that the moment the switch engine of the Terminal Association was coupled to the Receiver's train for the purpose of switching the cars from his main line to the tracks which he used under his agreement with the Terminal Association the Receiver's liability ceased and that of the Terminal Association began. (Rau Rec, 355.)

Judge Woods held that the decrees should be reversed on the ground that the pretended arrangement between the consignees and the Terminal Association, which counsel for the Receiver stated he *expected* to prove, became effective immediately upon the cars being placed on the tracks which the Receiver used under his agreement with the Terminal Association; that as soon as the cars were so placed on these tracks that association should be deemed as holding them, notwithstanding there had been no delivery of them in the usual and customary way that deliveries were made at that place by the Receiver to the Terminal Association, and that this would be true although the Terminal Association had no knowledge of the destination or consignee or contents of the cars. (Rau Rec., 344.)

Judge Jenkins dissented from these opinions, holding that the decrees of the Circuit Court should be affirmed. In commenting upon the opinion of Judge Woods, the presiding judge, he says:

"I am unable to concur in this conclusion. I have sought to show that there had been no delivery of these cars to the Terminal Association. It had not knowledge of their destination. It had not knowledge of the consignee of them. They were subject to the direction and control of the Receiver. The Terminal Association under its contract with the Receiver had placed these cars upon these tracks for the Receiver and for a compensation agreed upon. It therein was the agent of the Receiver. It could not know whether these cars were to be transported over its line or the lines of the Wiggins Ferry Company. It could not know in what direction they were to be transported, or their ultimate destination. When it had placed the cars on its track pursuant to its contract with the Receiver, it had nothing further to do with them until the Receiver had dispossessed himself of possession and control and had invested the Terminal Association therewith. I cannot comprehend that

the general agreement between the Terminal Association and consignees can become operative with respect to the contents of these cars until delivery to the Terminal Association and it had been invested with the exclusive possession and the exclusive control of them. The force of the reasoning is not perceived whereby it is held that because in fact these goods were ultimately to go to persons who had contracted with the Terminal Association—of which contract Receiver had no knowledge—therefore these goods were held under that contract before delivery in fact to the Terminal Association and before it was invested with exclusive control of them. * * * The question here is, whether the Receiver is absolved from liability; whether failing a delivery of the cars to the Terminal Association, failing a surrender by the Receiver of control over them, with ignorance upon the part of the Terminal Association of their destination or their consignees, the agreement between the Terminal Association and the consignee had not become operative in respect to these goods. I think not. If the Receiver had directed that the Terminal Association under its contract with him should transfer these goods to the Wiggins Ferry Company, his order must have received recognition and have been carried out by the Terminal Association, and it cannot be doubted that up to the time of the fire in question the goods were so subject to the Receiver's direction and control. For these reasons I think that the decrees appealed from should be affirmed." (Rau Rec., 354.)

Assignment of Error.

The court below erred in holding that the Receiver had delivered the cars in controversy to the Terminal Association, and that that association was holding them at the time they and their contents were destroyed by fire.

ARGUMENT.

I.

Circuit Judge Showalter, in his opinion, holds that the act of the Terminal Association in switching the cars from the Receiver's main track to the track which he used under his agreement with that association constituted a delivery of the cars by the Receiver to the Terminal Association, and that a delivery of the customary way-bill was not necessary to a delivery of the cars. This holding, we submit, is not only utterly opposed to the custom under which deliveries of cars were made by the Receiver to the Terminal Association at East St. Louis, as disclosed by the undisputed testimony, but is in conflict with the decision of this and other courts.

There is no dispute in the testimony as to the custom under which deliveries of cars were made at East St. Louis by the Receiver to the Terminal Association. This custom was that a car was never treated as delivered until a way-bill therefor had been passed to the Terminal Association. It is apparent to anyone who is at all familiar with the transportation business of the country that this must, in the very nature of things, be the custom and practice, for it can readily be seen what confusion and delay would arise in the interchange of traffic in car-loads between the various railway companies if each company should, upon the arrival of cars at the terminus of its line of road, or at such other place where delivery is made to the next succeeding carrier, claim that it had made a delivery by merely placing or causing cars to be placed upon certain

tracks without notifying such succeeding carrier, either by way-bill or otherwise, of the delivery, or giving any instructions or directions for their further transportation. It is clearly apparent that without such a way-bill, or something that is its equivalent, the succeeding carrier would not know what disposition to make of the car. It would not know its contents, its route or destination or the party to whom it should be delivered, neither would it have any data upon which it could make a charge for transporting it. All this information is withheld by the preceding carrier, in this case the Receiver, until the customary way-bill is delivered, and so long as it is withheld from the succeeding carrier there cannot, in the very nature of the transaction, be a delivery of the property to which such information applies. It is to the interest of both shippers and carriers, as well as to the commerce of the country generally, that there should exist no doubt as to what constitutes a delivery of property in course of transportation, as between connecting carriers.

That cars were never treated as delivered to the Terminal Association until the Receiver had delivered way-bills therefor is clearly shown by another circumstance which the undisputed testimony discloses, which is that whenever the Receiver delivered cars to that association, if such cars belonged to some other company, his car accountant immediately on the very day of the delivery of way-bills therefor, *and not until then*, reported to the company owning the cars the fact that certain of its cars, giving their numbers, had on that day been delivered by the Receiver to the Terminal Association. This was the practice at East St. Louis as well as at all junction points. (Rau Rec., 80, 81, 82, 87, 88, 96, 138, 139, 140, 227.)

These reports are called junction reports, and by means of them each railway company is advised of the whereabouts of its cars when they are out of its possession. Mr. Beecham, car accountant of the Chicago, Milwaukee and St. Paul Railway Company, and Mr. Bradley, the Receiver's car accountant, both testified that the Receiver had not reported any of the cars in controversy as having been delivered to the Terminal Association. (Rau Rec., 89, 96, 139, 140.) This was because no way-bill had been delivered by the Receiver to the Terminal Association of any of the cars of barley in controversy. And in this connection the attention of the court is called to the significant fact that prior to and up to the time of the fire, whenever the Receiver delivered a way-bill to the Terminal Association, at the same time such way-bill was delivered, he caused to be sent by his car accountant to the car accountant of the company whose cars were delivered, by such way-bill, such junction report, advising that company of the delivery of the car named in such way-bill to the Terminal Association, *and not until a way-bill had been delivered for such car was that car reported delivered to that association.* So that a junction report and a way-bill went hand in hand with every car that was delivered by the Receiver to the Terminal Association. For example: Mr. Felps, the agent of the Terminal Association, testified (Rau Rec., 78, 79) that on the 28th day of October, the day of the fire, the Receiver delivered three cars of the Chicago, Milwaukee and St. Paul Railway Company, Nos. 2,100, 31,872 and 16,562, to the Terminal Association by delivering way-bills therefor. By referring to the testimony of Mr. Beecham (Rau Rec., 90, 91, and Exhibit "E," Rau Rec., 117), it will be seen that

on the very day the way-bills for these three cars were delivered to the Terminal Association, the Receiver's car accountant reported these three cars as having been delivered on that day to the Terminal Association.

Now, what does Mr. Felps say he did immediately upon the receipt of the way-bills for these three cars?

Q. What did you do after receiving these way-bills with respect to those cars?

A. Cars carded out as usual to their proper connections or destinations.

Q. Following the directions of the way-bills?

A. Yes, sir; in accordance with the instructions.

Q. Was the service rendered by the Terminal Association, in breaking up of the train of the receiver when it came in on the "Y," and placing the cars on these tracks marked red, a separate and distinct service from the work you did after receiving the way-bills?

A. It was a separate and distinct service.

Q. Explain how and why?

A. We received for this service, taking care of the cars for which we had way-bills, a separate revenue.

Q. Separate from what?

A. From making and breaking up trains. (Rau Rec., 79.)

By an examination of the testimony it will be seen that in every instance the Receiver did not report a car as having been delivered to the Terminal association until he had delivered a way-bill therefor to that association.

This custom is in accord with the views of text writers and the decisions of the courts. Ray, on Freight Carriers, 388, says:

"The placing of a car by an initial carrier on the side track of a connecting carrier, without giving the latter any notice and without marking it with the name and address of the consignee, *or sending any way-bill or shipping directions*, does not establish the relation of common carrier between the initial and the connecting carrier."

The following cases hold the same rule:

Tex. & Pac. Ry. Co. v. *Clayton*, U. S. C. C. A., 2nd Cir., 51 U. S. App., 676; s. c., 84 Fed. Rep., 305.

Mt. Vernon Car Co. v. *Ala. G. S. Ry. Co.*, 92 Ala., 296.

Ins. Co. v. *Ry. Co.*, 55 Tenn. Repts., 268.

Palmer v *Pa. Co.*, Conn. Sup. Ct., 13 Atl. Rep., 818.

In *Mt. Vernon Car Co.* v. *Ala. G. S. Ry. Co.*, *supra*, the court say:

"The same rule is applicable in the case of connecting carriers; the responsibility peculiar to the common carrier is not devolved on the next connecting carrier until the receiving carrier has delivered the goods to the former *with directions for their shipment, the place of destination and to whom consigned. Until this is done the relation of common carrier is not established between the shipper and the connecting carrier.*"

In *Texas & Pacific Ry. Co.* v. *Clayton*, *supra*, the question of delivery between connecting carriers was discussed by Circuit Judge WALLACE. He says:

"It may be safely affirmed, as a proposition applicable to all cases, that a deposit of the goods with notice, express or implied, at any place where the second carrier has control of them, conformable with usage created by the course of business between the two carriers, is a sufficient delivery, and discharges the first carrier. The liability of the second carrier begins when that of the first ends. * * * In the present case the cotton had never been placed within the control of the steamship line of the defendant. * * * Before the steamship line could have identified it for the purpose of removal, and after that, before they could have exercised any control over it, the co operation and assistance of the defendant were necessary."

So here the Receiver, up to the time the cars of barley

were destroyed, had full control over their further movement. He so testified. (Rau Rec., 228.) For without the information which would be conveyed by the delivery of the customary way-bill, the Terminal Association could not identify them for further transportation, neither could it transport them, as it had no knowledge concerning their contents, their route, destination or consignee. This information was all with the Receiver, and until he imparted it to the Terminal Association by the delivery of the customary way-bill, that association could exercise no control over the cars in the way of their further transportation.

These decisions are all in harmony with the rule of this court announced in *Pratt* v. *Grand Trunk Ry. Co.*, 95 U. S., 43, cited by Circuit Judge Jenkins in his dissenting opinion. In this case the freight in controversy was *package* freight. Something more is required in making a delivery of a car loaded with merchandise from one carrier to another, than is required in making a delivery of package freight. The package is addressed, and the receiving company can readily ascertain from the package itself the consignee and destination; but a freight car has no marks nor address upon it showing the consignee, route or destination. This information is only found in the way-bill, and until that is delivered there cannot, in the very nature of things, be a delivery of the car.

The Terminal Association, in switching the Receiver's cars from his main track and placing them upon the tracks which he had the use of under his agreement, did not thereby take possession of such cars or accept delivery of them as a carrier. Whatever possession it thereby had of the cars was under its agreement to furnish the Receiver the use of certain tracks in its yards for *his* cars, and to

switch *his* cars from his main line to certain other of *his* tracks. As between the petitioners and the Receiver, these tracks were his tracks and the switch engines his engines, as much so as if he had owned them outright. And the cars and the freight they contained while on these tracks were the Receiver's so far as handling and caring for them. The preamble of the agreement makes this plain:

"That, whereas, the party of the first part undertakes to give to the party of the second part (the Receiver) terminal facilities at East St. Louis for the handling of *its* (his) trains, care of *its* (his) engines and cars and the handling and care of *its* (his) freight, under the following terms and conditions."

While this agreement did not exclude the relation of connecting carriers as between the Receiver and the Terminal Association, neither did it change their relation. The same acts were required of the Receiver in making a delivery of cars to the Terminal Association as would have been required had there been no contract relations between the two and the Receiver had owned the necessary terminal facilities at East St. Louis. In treating the question as to what constitutes a delivery as between the Receiver and the Terminal Association, the agreement by which the Receiver acquired the use of certain terminal facilities at that point should be wholly eliminated and the case treated precisely as it would be treated if the Receiver had owned the terminal facilities which he used under his agreement with that association. Carriers cannot shift responsibilities by contracting with others to perform the duty incumbent upon them.

Covington Stock Yards Case, 139 U. S., 128.

R. R. Co. v. *Reich*, 32 S. W. Rep., 818.

It must, therefore, be regarded as a fact that the terminals which the Receiver used at East St. Louis were for all purposes, as between him and the petitioners, his terminals, and that the tracks, engines and the men employed about them in the handling of cars brought there by his trains were all his. So that when his trains arrived at East St. Louis, were broken up, and the cars placed on certain tracks which he had the use of, under his agreement, as between him and the petitioners, the engines and the cars doing this work were his, and the tracks upon which the cars were left standing until they were way-billed out were likewise his tracks. The case, therefore, stands as if the Receiver had, in fact, owned the terminals which he, in fact, used, and the trains had been broken up by his own switch engine and switching crew and the cars placed upon his own tracks. Had the Receiver owned the facilities which he had the use of and in fact did use under his agreement with the Terminal Association, no one would for a moment contend that the breaking up of his trains and placing the cars upon the tracks where they stood at the time of the fire constituted a delivery of them to the Terminal Association. And yet there is as much warrant for such a contention as there is to justify the claim which is now put forth, that he had delivered these cars and their contents to that association by simply having them switched from his main track to other of his tracks which he used in handling his business at East St. Louis. Up to the time that the Terminal Association took possession of cars under way-bills which had been delivered to it, it did nothing with them that the Receiver would not have done had these terminal facilities been his own. The Terminal Association therefore acted merely as the servant or agent of the Receiver in breaking up his

trains and placing his cars on certain tracks, for which it received from the Receiver fifty cents a car. *One railway company does not pay to another railway company fifty cents a car for the privilege of delivering cars to it.* And the fact that the Receiver under his agreement paid the Terminal Association fifty cents a car for breaking up his trains and placing them on these tracks shows conclusively that in doing this work it was not expected nor intended by either of the parties that a delivery was thereby made of the cars so handled to the Terminal Association.

And further: It is provided in the agreement between the Receiver and the Terminal Association under which the cars of the receiver were handled by that association at East St. Louis, as follows:

"Second: Cars made 'bad order' by and during the making up and breaking up of trains of the party of the second part (the Receiver), to be repaired by the party of the second part, and the party of the second part shall furnish its own car inspectors. All cars made 'bad order' outside of the *yards set aside for the use of the party of the second part* shall be repaired by the party causing the damage." (Rau Rec., 100.)

This is significant, for it proves beyond all question that the Terminal Association in handling the cars of the Receiver *acted as his agent and not as an independent carrier;* and that while the cars were being switched from the Receiver's main track to the tracks set aside for the use of the Receiver, and while the Receiver's cars were standing upon the tracks set aside for his use in the yards of the Terminal Association, they were in his possession and not in the possession of the Terminal Association for he was required to inspect and repair all cars made "bad order" while so being handled, or while

standing upon such track. *The cars in controversy at the time they and their contents were destroyed by fire were all standing in that portion of the yard of the Terminal Association which had been "set aside for the use of the party of the second part"* (the receiver). This fact is stipulated, subdivision 2 of stipulation (Rau Rec., 103, 104); and likewise indisputably appears from the testimony (Rau Rec., 75, 77).

This fact, in connection with the undisputed testimony in the case, that no way bill had been delivered to the Terminal Association for any of the cars and that the Receiver had not reported the delivery of any of the cars to the Chicago, Milwaukee and St. Paul Railway Company, the company owning them, proves conclusively that the cars at the time of the fire had not yet been delivered to the Terminal Association, and fully sustains the position of Circuit Judge Jenkins in his dissenting opinion.

II.

Circuit Judge Woods bases his conclusion that there had been a delivery of the cars and their contents to the Terminal Association wholly upon the statement of counsel for the Receiver, made at the conclusion of the hearing before the master (Rau Rec., 238-241), that he expected certain of the consignees to have been present and expected to prove by them that the Terminal Association had an arrangement with them by which it agreed to hold cars of barley on "*their tracks*" free of car service charges (meaning the tracks of the Terminal Aassociation) at East St. Louis, and give them other facilities in "*their yards*" at that place, and the consent of counsel for petitioners that the witnesses, if present, would testify substantially as counsel expected they would testify.

We feel that a wrong construction has not only been given to this statement, but an importance attached to it which is not warranted by the facts of the case, which are indisputably proven, and which we believe should be all-controlling in this case.

In considering the question of the delivery of freight as between connecting carriers when the same is in course of transportation, the rule that when possession is once proven to be in certain one of several carriers, the presumption is that such possession continues in that carrier until it is proven to be elsewhere, and that the burden is upon that carrier to show delivery, should not be lost sight of. And this burden is not met by offering proof that is conflicting or uncertain in its character or meaning, or proof that is susceptible of different constructions, theories and inferences. *The proof must be certain and convincing, and, taken as a whole, consistent with no other theory than that of delivery. This is the rule.* And it should be adhered to strictly in view of the other rule of the Federal courts, which is not the rule in most of the state courts, that the carrier in whose possession property is at the time of loss is alone responsible, and not the initial carrier, unless it is shown by clear and satisfactory proof that such carrier contracted for liability beyond its line; and such liability is never inferred from proof that is uncertain or doubtful.

Myrick v *R. R. Co.*, 107 U. S., 102.

The difficulties which beset shippers over several connecting lines of carriers, in case their property is lost, unless the rule that the carrier in whose possession the property is once shown to be shall show delivery by proof that is certain, clear and satisfactory, is strictly

enforced, is well illustrated in the case at bar. After a litigation lasting three years, the claimants are now advised by a divided court, each judge differing with the other, that they have been pursuing the wrong carrier. They have no contract with the initial carrier for a through liability; they made the best investigation they could, and after tracing the property into the possession of the Receiver, and being informed that the Receiver's agent at East St. Louis, under the direction of the Receiver, in making proofs of loss to the insurance companies concerning the destruction of the property involved in this litigation, stated under oath that the cars in question were standing on tracks that were used by the Receiver (Rau Rec., 88, 98, 163, 164); that no way-bill had ever been delivered by the Receiver to that association of any of the cars, although it was an invariable custom to do so when ever a delivery was made; *that the notices and directions in reference to the handling of the barley after it had reached East St. Louis, and while it was standing on these tracks, all passed between the consignees and the Receiver;* that the Receiver was required to inspect cars while they were standing on these tracks and to repair all cars made "bad order" while thereon, they naturally concluded that the Receiver had the possession of their barley at the time it was lost, and accordingly intervened, as they were solicited by the Receiver to do, in the foreclosure suit.

Returning to the proposition that possession of this property having been proven to be in the Receiver, the burden was upon him to show by proof that was clear and satisfactory that he had delivered it to the Terminal Association, let us briefly recur to what the testimony indisputably shows:

1. The Receiver had no terminal facilities at East St. Louis. He therefore contracted with the Terminal Association for the necessary yard room and track facilities, and switch engines and crews for the handling of his cars, making and breaking up his trains that arrived at and departed from that place, *and for storage room for a reasonable number of cars not exceeding one hundred and fifty at any one time.* Under this agreement, so much of tracks numbered from 40 to 50 as was necessary to give the Receiver storage room for 150 cars was, quoting from the second subdivision of the contract, "set aside for the use of the party of the second part"—the Receiver. And these were the tracks that were commonly and usually used by the Receiver for handling and storing his cars, and upon which they stood, after they had been switched from the Receiver's main track, until they were delivered to the Terminal Association by the switch engine of that association taking them off these tracks and placing them in its portion of the yard, and then taking them to destination, or delivering them to the Wiggins Ferry Company if they were routed by that line. (Testimony of Roeder, Rau Rec., 70, 72; Felps, 74; Lester, 175; Stapleton, 187; Calvert, 214.) To identify these tracks they were marked red on a plat introduced in evidence. All the cars in controversy were at the time of the fire standing on some one or more of these tracks. (Rau Rec., 76, 77.) *And it was stipulated by a written stipulation, signed by Receiver's counsel, that the cars in controversy at the time they were destroyed by fire were standing on the tracks that were commonly used by the Receiver under his agreement with the Terminal Association.* (Rau Rec., 104.) They were, therefore, in the Receiver's possession. The stipulation

concedes this. They were placed there and were standing there in pursuance of the aforesaid agreement between the Receiver and the Terminal Association. The Receiver had the same right to have them switched there and stored there as though the tracks were his and the engine which placed them there was his, for he contracted and paid for this right, and so long as he occupied no more than the allotted room—150 cars—he could have stored these cars there until the right to do so ceased with the expiration of the contract. At the time of the fire there were, all told, but seventy of the Receiver's cars on these tracks. (Rau Rec., 165, 168.) So that the Receiver had room to spare. Now, how can it be reasonably urged that these cars were not as much in the physical possession of the Receiver as they would have been had he owned the tracks outright on which they stood and the engine which switched them there?

If they were, then it necessarily follows that the Terminal Association was not holding them at the time of the fire, and therefore the arrangement which counsel expected to prove by certain absent witnesses, that it had agreed with the consignees to hold their cars on its ("*their tracks*,") free of car service charges, and give them other facilities in its ("*their* yards") had not yet become effective, for the cars were not in "*their yards*" nor on "*their tracks*," but were on the tracks of the Receiver. Let us recur to the statement which counsel made: It was that he *expected* to prove by certain witnesses that the Terminal Association had agreed to hold cars on "*their tracks*" free of car service charges at East St. Louis, and offered other facilities in and about "*their yards*" at that place. Appellees' counsel admitted that if the witnesses were present they

would testify substantially as counsel stated he *expected* they would testify. (Rau Rec., 238-240.) We at that time had no thought, and not until it was argued in opposing counsel's brief on these appeals did it ever occur to us, that it could or would be contended that this informal stipulation, made in the hurry of and for the purpose of expediting a hearing, would or could be construed in such a manner as to cover cars *while they were yet standing and being held on tracks used by the Receiver, under his agreement with that association, and when they had not been way-billed to that association and it did not know and could not know until such way-bill had been delivered that the cars contained barley, or what they contained.* ESPECIALLY WHEN THE RECEIVER'S AGENT HAD, BEFORE THIS STATEMENT OF COUNSEL HAD BEEN MADE, TESTIFIED POSITIVELY, AND AT THE INSTANCE OF COUNSEL FOR RECEIVER, THAT THESE CARS WERE HELD BY THE RECEIVER ON THESE TRACKS ON ORDERS PLACED WITH HIM BY THE CONSIGNEES TO HOLD THEIR BARLEY. (Rau Rec., 1:0.) We supposed, and we submit any counsel would reasonably have supposed under like circumstances, that this statement of counsel related only to cars *after* they had been delivered by the Receiver to the Terminal Association in the usual and customary way in which deliveries were made at that place, so that it could be said that the cars were standing on "*their tracks*" in "*their yards.*" We did not suppose that it would or could be construed to apply to cars while they were standing on tracks which the Receiver was using under his agreement with that association, made for no other purpose than to give him track and yard room for handling and storing *his* cars, or to cars while they were being held on such tracks on orders

placed with the Receiver's agent by the consignees to hold their barley. (Rau Rec., 190.)

The holding of Circuit Judge Woods that the supposed arrangement between the consignees and the Terminal Association had become effective as to the cars of barley in controversy, notwithstanding there had been no delivery of them by the Receiver to the Terminal Association and notwithstanding the receiver still had the control and direction of them, and notwithstanding the Terminal Association had not up to the time they were destroyed knowledge of consignees, route, destination or contents of the cars, is, we submit, completely and conclusively answered by Circuit Judge Jenkins in his opinion. We quote from that opinion:

"It is held by the presiding judge that by reason of a certain supposed agreement between consignees in St. Louis and the Terminal Association—to the effect that the latter, as an inducement to barley dealers to ship over its lines, would hold cars containing shipments to such consignees on the tracks of the Terminal Association at East St. Louis—the Receiver was absolved and liability under such agreement imposed upon the Terminal Association so soon as these cars had under the contract with the Receiver been placed upon the tracks designated for the accommodation of the Receiver's cars. I am unable to concur in this conclusion. I have sought to show that there had been no delivery of these cars to the Terminal Association. It had not knowledge of their destination. It had not knowledge of the consignees of them. They were subject to the direction and control of the Receiver. The Terminal Association under its contract with the Receiver had placed these cars upon these tracks for the Receiver and for a compensation agreed upon. It therein was the agent of the Receiver. It could not know whether these cars were to be transported over its line or the lines of the Wiggins Ferry Company; it could not know in what direction they were to be transported or their ultimate destination. When it had placed the cars on

these tracks pursuant to its contract with the Receiver it had nothing further to do with them until the Receiver had dispossessed himself of possession and control and invested the Terminal Association therewith. I cannot comprehend that the general agreement between the Terminal Association and consignee can become operative with respect to the contents of these cars until delivery to the Terminal Association and it had been invested with the exclusive possession and the exclusive control of them. The force of the reasoning is not perceived whereby it is held that because in fact these goods were ultimately to go to persons who had contracted with the Terminal Association—of which contract the receiver had no knowledge—therefore these goods were held under that contract before delivery in fact to the Terminal Association and before it was invested with exclusive control of them. I do not undertake to say that the Terminal Association may not be liable to the receiver for its negligent acts causing the fire whereby this property was destroyed. Neither the question nor the party is before us. The question here is, whether the receiver is absolved from liability; whether, failing a delivery of the cars to the Terminal Association, failing a surrender by the receiver of control over them, with ignorance upon the part of the Terminal Association of their destination or their consignees, the agreement between the Terminal Association and the consignee had become operative with respect to these goods. I think not. If the Receiver had directed that the Terminal Association under its contract with him should transfer these goods to the Wiggins Ferry Company, his order must have received recognition and have been carried out by the Terminal Association; and it cannot be doubted that up to the time of the fire in question the goods were so subject to the Receiver's direction and control. For these reasons I think that the decrees appealed from should be affirmed."

2. That cars containing barley, after they were placed on these tracks and up to the time the Receiver had delivered to the Terminal Association the customary waybills for them, and that association had taken them off these tracks and placed them in its portion of the yard, as

testified by Felps (Rau Rec., 74, 75), they were held by the Receiver under an arrangement between him and the consignees, and not between them and the Terminal Association, there is no doubt under the testimony. For the Receiver's chief clerk, Stapleton, who was in charge of this business at East St. Louis under Calvert, the agent, testified, in response to questions asked of him by the Receiver's counsel, that after cars loaded with barley had been placed upon these tracks he would take the way-bills which came with the cars and notify the consignees that "*we*"—meaning the Receiver, not the Terminal Association—had a car, number so and so, loaded with barley, "Where do you want it?" and at such time as he—the consignee—got ready he would send the notice back, not to the Terminal Association, but to the Receiver's agent, to send the car to Hines' brewery, or Hiland or some other point. *Thereupon, and not until then, he, Stapleton, would make out a new way-bill for the car, deliver it to Felps, the agent of the Terminal Association, and take his receipt.* Now, why was this transaction? The following question and answer will explain:

Q. Was that a different and separate transaction, having reference to the original contract between the shipper and the Chicago, Milwaukee and St. Paul—*was it a new arrangement the consignee directed and controlled, or was it the original arrangement named by the shipper?*

A. *A new arrangement by the consignee, who placed orders with* us *to hold* his *barley.* (Stapleton's testimony, Rau Rec., 190.)

To the same effect is Calvert's testimony (Rau Rec., 216, 217, and Bosworth, receiver, 228).

What did Felps, the agent of the Terminal Association, do, upon receiving such way-bill from Stapleton, the Receiver's agent? This is his testimony, and it is uncontradicted:

Q. When you receive the way-bill of a car, what do you do then?

A. Card that car out and our yardmen are instructed to switch it out and deliver it according to the instructions.

Q. Does the way-bill contain the number of the car and destination?

A. Yes, sir; consignee, destination and route.

Q. *When you receive this way bill and switch the car out where do you take it?*

A. *Take the car out of* THEIR YARD, THEIR PORTION OF THE YARD, *and place it in the train in* OUR PORTION OF THE YARD, and take it to the connection or destination indicated.

Q. *What was the custom in respect to handling these cars set out on these tracks after they had been set there, on the part of the Terminal Association?*

A. *We had nothing to do with them at all until we received way-bills, if they stood there till doomsday.* (Rau Rec., 74, 75, 78.)

But if it is to be presumed, as it is by the opinion of the presiding judge of the court below, that Stapleton had sent to the consignee notices that the cars containing the barley in question had arrived, and asked them where they wanted them sent, then it must also be presumed that such notices were sent in pursuance of the arrangement which Stapleton says the consignees had with him to hold their barley until further orders. If this is true, then it also follows that this particular barley was not held by the Terminal Association under any arrangement which it had with the consignees to hold barley, but was held by the Receiver under the arrangement which he had with the consignees to hold their barley.

That this correctly states the case there can be no doubt, for it fully consists with the conduct of the parties in reference to this barley while it was standing on these tracks before way-bills had been delivered therefor. For

up to that time all transactions concerning it were had by the consignees with the Receiver; they treated the barley as in the Receiver's possession, and the Receiver regarded himself as having possession of it. The Receiver himself testified in response to a question asked by his counsel:

"Well, I would answer that by saying the St. Louis Terminal Association up to that point (meaning the time of the delivery of the way-bill) would not have recognized any order the consignee would have made directly to them, *and we would not have attempted to make a movement without the consignee*, WHO WOULD ORDER THROUGH OUR AGENT in East St. Louis. (Rau Rec., 228.)

What the Receiver did respecting the further transportation of this barley after receiving such orders from the consignees the following question and his answer thereto shows:

Mr. HANSON: And you would deliver to the terminal?

A. Yes, sir. (Rau Rec., 228.)

From this testimony of the Receiver himself it indisputably appears that until his agent at East St. Louis had delivered way-bills to the Terminal Association, that association would not recognize any orders of the consignees concerning this barley, and that he did not attempt to make a delivery of barley to the Terminal Association until he had received orders from the consignees to do so.

No orders having been received from the consignees respecting the barley in question, no delivery thereof was therefore made to the Terminal Association.

In view of such testimony and like testimony from his agent Calvert (Rec., 216, 217) and his chief clerk Stapleton (Rec., 190) that this barley while it was standing in

cars on these tracks before the delivery of way bills was held by the Receiver under an arrangement with the consignees, who placed orders with him to hold their barley for further orders, and that these further orders came directly to the Receiver from the consignees, except in occasional instances (Rau Rec., 192, 193) when they got into the hands of Mr. Roeder, a joint agent, who always turned them over to the Receiver's agent, how can it reasonably be contended that this barley was at the time it was destroyed in the possession of the Terminal Association, or was held by it under some arrangement made with the consignees for holding their barley on its tracks. Especially when there had been no delivery of it to that association, either actual or constructive, and when that association could not know and did not know what the cars contained until they were delivered to it in the usual manner by delivering the customary way-bill. *For, does not the testimony indisputably show that after the cars were placed on these tracks, and up to the time way-bills therefor were delivered to the Terminal Association, the Receiver held them on orders placed with his agent by the consignees to hold their barley for further orders, and that he delivered cars of barley to the Terminal Association only after having received orders from the consignees to do so.* THERE IS NO PROOF OF SUCH ORDERS HAVING BEEN RECEIVED. THE RECEIVER, THEREFORE, WAS HOLDING THIS BARLEY AWAITING THE ORDERS OF THE CONSIGNEES PURSUANT TO HIS ARRANGEMENT WITH THEM.

And further, the arrangement which counsel for Receiver stated he *expected* to prove by certain absent witnesses was that the Terminal Association agreed to hold the cars on its tracks free of car service. (Rau Rec.,

239.) The arrangement which the receiver proved he in fact had with the consignees was, to hold their barley at East St. Louis until they advised his agent at that place where in St. Louis they desired it sent · and when so advised, such agent would make out a new way-bill containing the name, number, contents, consigeee and destination of the car and deliver it to the Terminal Association, take his receipt therefor, and then report to the company owning the car the delivery of it to the Terminal Association. (Rau Rec., 190.) The arrangement between the Terminal Association and the consignees, by the terms of it, was effective only *as to cars that were held by that association on its tracks.* It was not intended to apply to cars that were held by the Receiver under his arrangement with the consignees to hold their barley awaiting their orders. The apparent purpose of the arrangement which the consignees had with the Terminal Association was to relieve the consignees from car service charges on such cars as the Terminal Association held on *its tracks;* such arrangement had no application to cars which the Receiver might hold on the tracks which he had the right to use, and in fact used under his agreement with that association, especially cars which were being held by him for the consignees, under an arrangement with them to hold their cars awaiting their orders. Besides the tracks upon which the cars in controversy were standing at the time of the fire were tracks which the Receiver used and had the right to use for storing his cars at the rate of one hundred and fifty cars at a time. These tracks were his tracks for such use, as much so as if he had owned them outright; and while his cars stood thereon, and until he had delivered the customary way-bill to the Terminal Association, and taken

the usual receipt therefor, they were standing on his tracks and not on the tracks of the Terminal Association, and were held by him under the arrangement which he had with the consignees to hold their barley, and not by the Terminal Association under its arrangement with the consignees to hold cars on its tracks free of car service. It would hardly be presumed that the Terminal Association after having granted the right to the Receiver to use certain of its tracks in its yards for storing his cars to the extent of one hundred and fifty at a time, would make an arrangement with other parties for the use of the same tracks at the same time for the storage of their cars free of car service. However viewed, it is apparent from the whole testimony in the case that the cars in controversy at the time they were destroyed were being held by the Receiver under his arrangement with the consignees to hold their barley awaiting their orders, and not by the Terminal Association, for they were not on its tracks, and the arrangement for free car service could not therefore apply.

Stated most favorably to the Receiver, the testimony which he *in fact* introduced in evidence, and the testimony which he stated he *expected* to introduce in evidence, proves, or tends to prove, that the consignees had an arrangement with both the Receiver and the Terminal Association for holding barley at East St. Louis. This testimony, if reconciled as it should be, can all be given effect; for it shows that the arrangement which the consignees had with the Receiver for holding their barley awaiting their orders was intended to apply while it was standing on the tracks which the Receiver used, between the time of its arrival at East St. Louis and the time when it should be way-billed over to the Terminal Association;

and that the arrangement they had with the Terminal Association to hold cars on "*their tracks*," free of car service, and for other facilities in "*their yards*," applied to cars of barley after they had come into the possession of that association in the usual and customary way, by the delivery of way-bills, and had been switched into "*their yard*" and were on "*their tracks;*" *or* to cars which the Receiver could not hold on his tracks by reason of the limited space which he had contracted for being fully occupied by other of the Receiver's cars. For the Receiver had storage room for only 150 cars at a time, and it may well be presumed that at times he did not have sufficient space to store all the cars which the consignees desired held at East St. Louis under their arrangement with the Receiver, and they, therefore, made an arrangement with the Terminal Association to store such cars as the Receiver had not room for "*free of car service.*" This court can very well see what is liable to confront these barley shippers if they shall be driven to sue the Terminal Association.

It is more reasonable, and certainly more in accord with the rules of evidence, to harmonize this testimony—all coming from the Receiver's witnesses—in this manner, than it is to eliminate from the case the testimony of Stapleton, Calvert and the Receiver himself, as would have to be done if the construction given by the presiding judge of the court below to the testimony which Receiver's counsel stated he had *expected* to introduce, is adhered to. Unless this testimony can be reconciled, as we think it can and should be, then it is in serious conflict, and the conclusion necessarily follows that the burden of proof which was upon the Receiver to show by clear and satisfactory evidence that he had made a delivery of these

cars and their contents before the loss occurred, has not been met. For the testimony of his witness Stapleton, that barley arriving at East St. Louis was held there by the Receiver up to the time it was way-billed out under "*a new arrangement by the consignee, who placed orders with us* (*the Receiver*) *to hold his barley*," as well as the testimony of Calvert and the Receiver, is absolutely inconsistent with the theory or claim that there had been a delivery of the barley and cars in controversy to the Terminal Association.

While on the other hand, if the arrangement which counsel for Receiver expected to prove by certain witnesses, that the Terminal Association had agreed to hold cars of barley for the consignee in *its yards* at East St. Louis, free of car service, is given the construction which is placed upon it by Circuit Judge Jenkins in his opinion, viz: that this arrangement was only intended to apply to cars loaded with barley, after there had been a delivery in accordance with the usual method of making deliveries of barley by the Receiver to the Terminal Association, and as explained by Felps (Rau Rec., 74, 75, 78), so that the cars were, quoting from counsel's statement, "*on their tracks*," it is then not only consistent with the arrangement under which the Receiver and his witnesses, Calvert and Stapleton, say the barley was held between the time of its arrival and the delivery of way-bills therefor to the Terminal Association, but is consistent with the custom which all the testimony shows prevailed at East St. Louis, that as between the Receiver and the Terminal Association a car was never treated as delivered until the Receiver had delivered to the Terminal Association the customary way-bill, containing the name of the consignor, consignee, destination, route, number and con-

tents of the car. And further, until the way-bill for a car had been delivered, and not before, did the Receiver notify the company whose car he had so delivered had been delivered to the Terminal Association. This is significent. For it shows that the Receiver regarded himself as having possession of the car up to the time that the way-bill therefor was delivered.

This interpretation of the testimony is likewise consistent with the construction which, we contend, should be given the contract under which the Receiver used the tracks of the Terminal Association, viz: that while his cars were standing upon the tracks which he contracted and paid for the use of, he was liable for all such cars as were made "bad order" while on such tracks, as much so as if he had owned the tracks absolutely. (Rau Rec., 100.) This fact of itself shows that the possession of such cars were with the Receiver.

And further, such interpretation is consistent with the stipulation of the parties, that the cars in controversy at the time of the fire were standing on the tracks which the Receiver had the use of under his agreement with the Terminal Association. (Rau Rec., 103.) This fact is likewise significant, for it shows conclusively that the very cars in controversy were in the Receiver's possession at the time of the fire, for they were at that time, and had been ever since their arrival at East St. Louis, standing on the tracks which the Receiver had the use of under his agreement. This agreement took the place of ownership, and possession under it was the same as possession with ownership.

We therefore submit that a wrong conclusion has been reached, that a wrong construction has been given to the statement of counsel for Receiver as to what he expected

to prove by certain witnesses—a construction that was not intended by the parties, a construction that petitioners should not be bound by in view of the testimony of witnesses for the Receiver, that the consignees had arranged with the Receiver to hold their barley upon its arrival at East St. Louis until further orders, and of the stipulation of the parties that the particular cars in controversy were at the time of the fire standing on the tracks which the Receiver had the use of under his agreement with the Terminal Association, a construction which raises a serious conflict between the testimony which counsel stated he *expected* to introduce, and the testimony of Stapleton, Calvert and Bosworth, which he *did* introduce in evidence—a construction which is far beyond that which petitioners' counsel ought reasonably to have expected in view of the testimony, which Receiver's counsel had introduced prior to the making of that statement, in reference to the arrangement which the consignees had with the Receiver for holding this barley, and the custom which all the testimony shows prevailed at East St. Louis, that a car loaded with barley, while standing on the Receiver's tracks, was never treated by the Receiver as delivered to the Terminal Association until his agent had delivered a way-bill for the car, taken the usual receipt therefor and the car switched from his portion of the yard. We feel also that Circuit Judges Woods and Showalter, in the consideration of these cases, have overlooked the well-established rule of law, that when possession of property is once proven to be in a carrier the presumption is that such possession continues until it is shown to be elsewhere; and that the burden is upon the carrier to show by a preponderance of proof—proof that is clear and satisfactory, not conflicting or as consistent

with non-delivery as with delivery—that there had been a delivery of the possession either to the consignee or the succeeding carrier, whichever the case may be. This proof, we submit, is not present in these cases. For if the construction which we are contending for is not to be given to the statement of counsel, then it is at war with the testimony of his other witnesses Stapleton, Calvert and Bosworth, as well as with nearly all the other testimony in the case which relate to the holding and delivery of cars loaded with barley at East St. Louis. A carrier upon whom the burden of proof rests to show delivery of property to a connecting carrier, especially in a suit by the owner to recover its value in case of loss, cannot and ought not to discharge that burden by testimony that is conflicting or is susceptible of two or more constructions, or is as consistent with non-delivery as with delivery

Such is the case here—if the construction which the presiding judge of the court below has given to counsel's statement is to prevail.

3. It is assumed by the presiding judge of the court below that the Receiver's agents at East St. Louis had sent to the consignees the usual notice of the arrival of the cars of barley in question. There is no proof to sustain this presumption, and the master found that no notice had been sent by the Receiver's agent to the consignees. (Rau Rec., 61.) But, conceding this to be true, then the other presumption inevitably follows, that such notice was sent in pursuance of the arrangement which Stapleton testified was "*a new arrangement by the consignee, who placed orders with us to hold his barley.*" (Rau Rec., 190.) This leaves no room for the contention that this particular barley at the time it was destroyed was

being held by the Terminal Association under an arrangement with the consignee. *For the fact that the Receiver's agent sent notices to the consignees that he had certain cars loaded with barley consigned to them, giving the number of the cars in controversy, asking them where they wanted them sent, and that this was done in pursuance of an arrangement between him and the consignee to hold their barley on their orders, placed with him, shows conclusively that the particular barley in question at the time it was destroyed was being held by the Receiver under his arrangement with the consignees to hold it, and not by the Terminal Association under its alleged arrangement with the consignees.* The presumption that the customary notices covering the particular cars of barley in controversy were sent by the Receiver's agent to the consignees, and that such notice was sent in pursuance of "*a new arrangement the consignee directed and controlled*"—"*a new arrangement by the consignee, who placed orders with us* (the Receiver) *to hold his barley*" (Rau Rec., 190 , precludes the claim that the barley in question was being held under any other arrangement than that testified to by the receiver's witnesses.

And further: Under the arrangement which the receiver had with the consignees for holding their barley, the receiver's agent at East St. Louis would send a notice to the consignees that he, the receiver, "*had a car numbered so and so loaded with barley—where do you want it?*" At such time as the consignees got ready they would send this notice back to the receiver's agent with a notation thereon to send the car or cars mentioned in the notice to Hines' brewery, or Highland, or some other point. Thereupon, the receiver's agent would make out the usual way bill and deliver it to the agent of the Ter-

minal Association. The Terminal Association would thereupon take this way-bill, locate the car or cars named therein, and then switch the same from the Receiver's portion of the yard to its portion of the yard, and at the proper time place them in its train and take them to the destination indicated on the way-bill. There is no proof, and it is not contended by the Receiver, that the consignees up to the time of the fire had given the Receiver any notice or directions concerning the further movement of this barley. Now, if it is to be presumed that the Receiver had given the consignees of this barley the customary notice, then it must also be presumed that such notice was sent in pursuance of the arrangement which the Receiver says he had with the consignees of holding this barley awaiting their orders for its further movement. This being so, and it being an invariable practice to make out and deliver to the Terminal Association a way-bill immediately upon the receipt of notices from the consignee as to where they wanted barley sent, *and no way-bill having been made out or delivered by the Receiver for any of the cars in controversy*, in the absence of proof to the contrary, it must be assumed that no directions had been given by the consignees to the Receiver in response to the notice which the presiding judge of the court below assumes the Receiver had given to the consignees of the arrival of the cars of barley in question. IT FOLLOWS FROM THIS THAT AT THE TIME OF THE FIRE THE CONSIGNEES HAD NOT YET DETERMINED UPON THE PLACE IN ST. LOUIS WHERE THEY DESIRED THEIR BARLEY SENT OR WHETHER THEY DESIRED IT SENT BY THE WIGGINS FERRY COMPANY OR THE TERMINAL ASSOCIATION, AND, THEREFORE, THE RECEIVER WAS HOLDING THIS BARLEY FOR THE CONSIGNEES, AWAITING THEIR ORDERS AS TO

WHERE IN ST. LOUIS THEY WANTED IT SENT AND BY WHAT ROUTE.

That the claims which the Receiver now puts forth are an after-thought is clearly shown by his action in presenting proofs of loss to the insurance companies. It appears from the testimony that Mr. Calvert, his agent at East St. Louis, by his direction, prepared a sworn statement showing the cars and the value of their contents, which were destroyed by fire, and presented that statement to the insurance companies for the purpose of collecting the insurance thereon, and so far as the record shows has collected such insurance. In that statement Mr. Calvert says:

"During the night of October 28, 1894, a fire occurred on the tracks of the Terminal Railway Association of East St. Louis, State of Illinois (said tracks being used by the Chicago, Peoria and St. Louis Railway Company), and burned the cars and wholly consumed the property and freight in transit in said cars, as set forth in the statements attached hereto and forming a part of this proof of loss" (*which statements contain a list of the cars in controversy*).

That this statement is true is shown by the undisputed testimony in the case. The tracks upon which the cars stood were the tracks which had been set apart for the Receiver under his agreement with the Terminal Association This affidavit shows, as does the whole testimony, that these cars, instead of having been delivered to the Terminal Association, were yet upon the tracks used by the Receiver, and therefore were in his possession, as much so as they would have been had the Receiver owned outright the tracks upon which they stood. It is likewise true, as stated by Mr. Calvert, that these cars were still in transit, as alleged in the intervening petitions and as shown by the testimony, as well as by the stipulation

of August 27, 1895, hereinbefore referred to; for all this property was consigned to St. Louis, Missouri (*it is so stipulated*, Rau Rec., 103, 106), and would have been transported there had it not been destroyed by fire.

Possession of the cars and barley having been shown to be in the Receiver, the burden rested upon him to show delivery either to the consignees or to the Terminal Association or the Wiggins Ferry Company, a competing line to St. Louis; and having shown that he had an arrangement with the consignees to hold their barley at East St. Louis while awaiting their orders for further transportation, and that under this arrangement he, the Receiver, had adopted the custom of notifying the consignees of the arrival of their barley at East St. Louis and they in turn would notify him when and where they wanted the barley delivered to them in St. Louis, the burden was upon the Receiver to show that he had sent the customary notices to the consignees of the arrival of this particular barley, before he could be heard to say that his liability as a carrier had ceased; and before he could claim discharge even from the liability as a warehouseman it was necessary for him to have shown that the consignees had given him orders to forward this particular barley to St. Louis, either by the Terminal Association or the Wiggins Ferry Company, and that in pursuance thereof he had delivered way-bills therefor to the transportation company designated. In other words, the Receiver having shown a custom of notifying the consignees of the arrival of their barley at East St. Louis, and holding such barley until he received orders from them to give directions for its further transportation, the burden was cast upon him to show that he had complied with such custom by giving the usual notices to

the consignees of the arrival of their barley, and not having shown that the usual notices were sent to the consignees, it must be presumed that none were given in respect to the barley in question. The master before whom these causes were tried found as a fact that the customary notice had not been given. The custom which the Receiver's agent at East St. Louis testified to (Rau Rec., 190), in respect to notifying the consignees of barley arriving at that point and of holding their barley awaiting the orders of the consignees as to further transportation of the barley, we submit is all-controlling in this case, for it determines where the possession of this particular barley was at the time it was destroyed by fire.

The whole conduct of the receiver in respect to this particular barley is inconsistent with any other theory than that he was in possession of it at the time it was destroyed by fire. The customary notices to the consignees not having been given, the customary way-bills not having been delivered the customary junction car reports not having been sent to the C. M. & St. P. Ry. Co., the owner of the cars which contained this barley, in connection with the fact that the cars containing this particular barley were all standing on tracks which had under the agreement been set apart for the use of the Receiver in the yards of the Terminal Association, and of the other fact that the Receiver in presenting his proofs of loss to the insurance companies included therein the cars and the barley in controversy, and as a part of such proofs of loss stated that the tracks upon which said cars stood at the time of the fire were the tracks used by him in the yards of the Terminal Association, and that the freight contained in said cars was in transit, prove conclusively that the cars and barley in controversy were in

possession of the Receiver at the time they were destroyed by fire.

We, therefore, respectfully submit that a wrong construction has been given the statement of counsel for Receiver, and a value attached to it that is not warranted by the testimony which the Receiver himself introduced. Either this is true, or the testimony which counsel expected to introduce is wholly inconsistent with the testimony which he did in fact introduce, in which event we contend that the burden of proof which was cast upon the Receiver was not met, and for that reason the conclusions of Circuit Judges Woods and Showalter are erroneous.

III.

THE RECEIVER HELD THE CARS AND THEIR CONTENTS AT THE TIME OF THE FIRE AS A CARRIER.

The cars and the barley they contained were still in transit. The Receiver, through his agent, Calvert, so declared when he presented his claims for damages arising out of this fire to the insurance companies. But, aside from this, the property was all consigned to consignees at St. Louis, Missouri, by way of East St. Louis; the stipulation of August 27, 1895, so states; it had not, therefore, reached its destination. And if the Receiver was holding this property, as we claim he was, at the time of the fire, he was holding it not for the purpose of making a delivery to the consignees at East St. Louis, but for the purpose of making a delivery of it to the Terminal Association, or The Wiggins Ferry Company to be taken to its destination and delivered to the consignees there.

The property having been consigned to St. Louis, a point beyond the end of the Receiver's road, the duty of the Receiver was when he received it into his possession at Peoria to carry it safely to East St. Louis, the end of his road, and there deliver it to the next succeeding carrier. The obligation to safely deliver these cars and their contents was just as imperative as the obligation to carry them safely, and until the Receiver had made such a delivery he held this property as a carrier. And although he held it awaiting directions of the consignees as to what place it should be taken to at East St. Louis, he held it as a carrier awaiting delivery, not to the consignees at East St. Louis, but to the Terminal Association, or the Wiggins Ferry Company for it to transport and deliver to the consignees at East St. Louis whenever they should give orders to the Receiver to deliver it to either one of said carriers.

The rule is well stated by Justice DAVIS in the case of *Ry. Co.* v. *Mfg. Co.*, 16 Wall., 318, and is pertinent here:

"If there be a necessity for storage, it will be considered a mere accessory to the transportation and as not changing the nature of the bailment. * * * It is argued, however, that there is no difference between goods to be delivered to the owner at their final destination and goods deliverable to the owner or his agent for further carriage; that in both cases as soon as they are ready to be delivered they are awaiting delivery. This position, although plausible, is not sound. There is a clear distinction in our opinion between property in a situation to be delivered over to the consignee on demand and property on its way to a distant point to be taken thence by a connecting carrier. In the former case it may be said to be awaiting delivery; in the latter case to be awaiting transportation."

Circuit Judge JENKINS in speaking of this phase of the case says (Rau Rec., 353):

"It will be observed that the transit of the barley was not ended upon the arrival of the cars at the end of the Receiver's line of road at East St. Louis. It was still to be transported over other and connecting lines to its destination. The barley was still in transitu. The record discloses that it was the custom of the receiver, with respect to goods consigned to the City of St. Louis, upon their arrival at East St. Louis to give immediate notice to consignees and take their directions to what part of the City of St. Louis the goods should be forwarded, and by what line—whether by the lines of the Terminal Association or by the lines of the Wiggins Ferry Company, two rival companies, whose lines of railway connected with the road of the Receiver. The master's report in the principal case states 'that no notice was sent to the owner, shipper or consignee of the arrival of said cars at St. Louis, or of the delivery of them to the terminal railroad.' The appellant has cast upon him the burden of showing that he has fulfilled his contract of carriage; that upon the arrival of goods, according to the custom of business, he had notified the consignees and taken their directions with reference to the further carriage of the goods. It is not shown that this notice was given, and the master reports that it was not."

See, also,

London v. *Ry. Co.*, 55 Mich., 218, 222.

Ill. Cent. R. R. Co. v. *Mitchell*, 68 Ill., 471, 477.

Bennett v. *Ry. Co*, 46 Mo. App., 657.

Irish v. *Ry. Co.*, 19 Minn., 379.

Mills v. *Mich. Cent. Ry. Co.*, 40 N. Y., 624.

Wehmann v. *Ry. Co.*, 59 N. W. Rep., 546.

Conkey v. *Ry. Co.*, 31 Wis., 624.

The authorities all hold that on shipments over connecting lines of the railroad a carrier's liability continues from the time it first attaches until the shipment reaches its final destination, and that no intermediate carrier holds the shipment as bailee, although there may be a delay in making deliveries between connecting carriers. In other words, the shipper's contract is for carriage, and until the goods reach their final destination he has a right to a continuous carrier's duty and responsibility, which cannot be changed to the duty and responsibility of a bailee or warehouseman.

IV.

IF THE RECEIVER DID NOT HOLD THE CARS AND THEIR CONTENTS AS A CARRIER, THEN HE HELD THEM AS WAREHOUSEMAN AND IS LIABLE AS SUCH.

That the Receiver was holding the cars in controversy under an arrangement with the consignees of the barley who had placed orders with him to hold their barley, is made certain by the testimony of Stepleton, his agent at East St. Louis. (Rau Rec., 190.) While holding this barley awaiting the orders of the consignees as to what point in St. Louis they desired it sent he was bound to exercise reasonable care in protecting it against loss or damage by fire. This point is raised by the amendment to the intervening petitions. (Rau Rec., 52.) Under the testimony which was given by witnesses on the part of the Receiver, the fact is indisputably proven that no care whatever was exercised by the Receiver or his employes in the care of this property, for it appears that the cars containing this barley were allowed to be placed about a wooden warehouse some six hundred feet in

length that was filled with hay, much of it loose and exposed to sparks which might be thrown upon it by every passing engine. This warehouse was open at its sides and ends and had two tracks passing through it lengthwise. The Receiver in his answer terms it "*a veritable fire trap.*" Rau Rec., 23.) The danger of fire was so patent that it had attracted the attention of Calvert, the Receiver's agent at East St. Louis. For his testimony, see (Rau Rec., 212, 214. Calvert's knowledge was the Receiver's knowledge. It matters not that this warehouse and tracks and engines did not belong to the Receiver. The negligence was in allowing these cars to be placed or stored upon tracks in close proximity to this long wooden warehouse filled with hay, a veritable fire trap, while he was holding them awaiting orders from the consignees. A fire starting in such a place was almost sure to get beyond control and result in great loss. All this could readily have been seen and was seen by the Receiver's agent at East St. Louis. A long wooden warehouse filled with loose hay exposed to the sparks of every passing locomotive is no place about which to stand cars loaded with valuable property.

Thomas v. *Ry. Co.*, 63 Fed. Rep., 200, is similar to this case. In that case cotton to the value of $85,000 was left in a position where it was exposed to sparks from passing steamboats, and also in close proximity to the tracks of the Illinois Central Rail Road Company. It was supposed that the fire originated either from sparks from the boats on the river or from the engines of the Illinois Central Company. The cotton at the time it was destroyed was in the possession of the Wabash Railroad. The court held that company liable on the ground that it was negligent in leaving the cotton in a place where it was exposed

to fire. In passing upon the question, ALLEN, District Judge, says:

"A position more exposed to sparks from the numerous vessels in a busy harbor, and from the smokestacks of the engines almost constantly passing on the railroad, could not have been chosen in Cairo, and it was at this exposed point that the barge containing the cotton was moored till it was destroyed by fire on the 28th of December. The fire originated most likely from sparks emitted from boats on the river or engines on the levee. It is not mere delay, therefore, but negligent delay in a dangerous place, willful it may be said, and deliberate exposure of the cotton to danger from fire that fixes the liability of the carrier. The danger could have been foreseen—should have been foreseen and guarded against."

The judgment in this case has recently been affirmed by the Circuit Court of Appeals for the Seventh Circuit, reported in 19 C. C. A., p. 90.

See, also,

Dodd v. *Ry. Co.*, 27 S. W. Reptr., 227.
Tanner v. *Ry. Co.*, 15 N. E. Reptr., 79.
Gregg v. *Ry. Co.*, 147 Ill., 555.

Circuit Judge JENKINS, in passing upon this phase of the case in the court below, says:

"The appellant (Receiver) has cast upon him the burden of showing that he has fulfilled his contract of carriage; that upon the arrival of goods, according to the custom of business, he had notified the consignees, and taken their directions with reference to the further carriage of the goods. It is not shown that this notice was given, and the master reports that it was not. This phase of the case, however, need not be dwelt upon; for, assuming that notice had been given, and no instructions received within a reasonable time, the liability of the Receiver as a common carrier was discharged, but liability as warehouseman was assumed. *The goods were still in his custody and under his control. They had not been delivered to the Terminal Association for further carriage*

or for any other purpose. The cars were placed upon the tracks designated as the yard tracks of the Receiver, and were there for his accommodation. The Terminal Association had no control over them. It was not advised of the destination of those cars, or of the consignees. Until such advice, it could not rightfully take possession of them, nor rightfully transport them, nor safely deliver them. They might be for transportation over the Wiggins Ferry Company, its rival; and the Terminal Association was bound by its contract with the Receiver to furnish switch engines for the transportation of those cars, and their delivery to the Wiggins Ferry Company, when so ordered. If, in the case supposed, the Receiver held them merely as warehousemen, he is still liable, for his answer asserts that the cars were placed in close proximity to a '*vertiable fire trap*'; *so that, whether the Receiver is to be regarded, with respect to his obligation, as insurer or as warehouseman of these goods and these cars, he is liable for their destruction.*"

V.

IT WAS CONTENDED BY THE RECEIVER IN THE COURT BELOW THAT UNDER THE "STATION RECEIPTS" WHICH WERE PUT IN EVIDENCE HIS LIABILITY AS A COMMON CARRIER OF THE BARLEY TERMINATED UPON THE ARRIVAL OF THE CARS AT EAST ST. LOUIS.

This claim has no support in this case either in fact or in law.

1. It appears from the testimony (Rau Rec., 257, 258, 259, 264, 265, 266), and the master so found (Rau Rec., 59), that neither station receipts nor bills of lading were given for these shipments at the time they were received by the railway company, but that long afterwards —after the property had been destroyed—the shippers applied to the railway company for such station receipts

for the purpose of presenting their claim for the loss which they had sustained in order to satisfy the Receiver that the property destroyed had been delivered for transportation. These shipments were not, therefore, made under station receipts or bills of lading, and the limitations on liability therein do not apply.

"After the goods are shipped it is too late to impose upon the shipper a clause exempting the carriers from liability for loss by fire after such fire has occurred."

Lamb v. *Camden & A. A. Co.*, 4 Daly, 483.

2. The station receipts, so for as they attempt to limit the liability, have no binding force upon the shippers. The undertaking on the part of the Receiver to the shippers was to transport this property from Peoria to East St. Louis, the end of its line, and there deliver it to the next succeeding carrier for it to take to destination and there deliver it to the consignees. The undertaking on the part of the Receiver to deliver this property to the Terminal Railroad Association or to the Wiggins Ferry Company was just as imperative as was the undertaking to safely carry it from Peoria to East St. Louis. The remarks of Justice Field in *Ry. Co.* v. *Bank*, 123 U. S., 733, are pertinent here:

"There are no conditions which would release him from this duty (*i. e.*, the duty of delivery) except such as would also release him from the safe carriage of the goods. The undertaking of the carrier to transport the goods necessarily includes the duty of delivering them."

And the Supreme Court of the United States in *Railroad Co.* v. *Mnfg. Co.*, 16 Wall., 324, has held, and the doctrine of this case has repeatedly been affirmed by this and other courts, that stipulations contained in bills of

lading or receipts limiting the carrier's liability, which receipts or bills of lading are unsigned by the shipper, are not binding upon him, although he accepts them without dissent. The court say:

"Every intendment should be made in favor of the shipper when he takes a receipt for his property with restrictive conditions annexed and says nothing, that he intends to reply upon the law for the security of his rights."

3. These shipments were all made from Iowa, Minnesota and Wisconsin, and the statute law of those states, if any, will control; for whatever the contract was for these shipments, it must be construed with reference to the statute law of the states where the shipments were made. The statute of Iowa, section 1308, Revised Statutes of 1888, provides as follows:

"No contract, receipt, rule or regulation shall exempt any corporatien engaged in transporting persons or property by railway from liability of a common carrier or carrier of passengers which would exist had no contract, receipt, rule or regulation been made or entered into."

There is no statute in either Minnesota or Wisconsin. The common law is therefore to be applied on all shipments from those states; and the decisions of the Supreme Court of the United States will control as to what the rule of the common law is on the subject; for that court has held that on questions relating to mercantile and commercial law it will not be bound by the decisions of the courts of the state, but will exercise its own judgment.

Liverpool Steam Co. v. *Ins. Co.*, *supra.*
Myrick v. *R. R. Co.*, 107 U. S., 102.
R. R. Co. v. *Mfg. Co.*, 16 Wall., 318.

This court has held in *Liverpool & Great Western Steam Co.* v. *Ins. Co.*, 129 U. S., 397, 445, it to be the settled doctrine that the courts of the United States will take judicial notice of the laws of the several states of the Union as domestic laws. As to the shipments from Minnesota and Wisconsin, there being no statute on the subject, we will have to look to the decisions of the Supreme Court of the United States for the rule of law which should be applied in determining whether it is competent for a common carrier by a mere receipt or bill of lading, *unsigned by the shipper*, to relieve itself from the obligation which the law casts upon it to carry safely to the end of its line and there safely deliver to the next succeeding carrier if the property carried is consigned to a further point. That court has not left the question in doubt, for it is expressly held in the case of *Ry. Co.* v. *Mfg. Co.*, above cited, as well as in other cases, that a carrier cannot limit its common law liability.

4. And further, under the law a public carrier is bound to receive and carry and deliver safely all property which he holds himself out as carrying in consideration of the payment of the reasonable and usual compensation therefor. This obligation the carrier cannot relieve himself from, either by contract or otherwise, *unless the contract or agreement of shipment by which he seeks to discharge himself from such obligation is based upon a proper and adequate consideration.* A contract of this kind, like all other contracts, must have a consideration in order to be valid and binding, as will be seen by the case of *Hart* v. *Ry. Co.*, 112 U. S., 331, and other cases decided by this court.

In *Wehmann* v. *Ry. Co.*, 59 N. W. Reptr., 546, it is held to be the duty of a carrier receiving goods for car-

riage to carry them to the end of its line and there deliver them to the next carrier; that a stipulation that a common carrier shall be exempt from any of its common law liability needs a consideration to make it binding, such as a concession in rates or other like consideration and that a concession in rates will not be presumed as such consideration where such abatement is forbidden by law. *There was no concession of rates made to the shippers in this case; they paid the regular established rates, the same as was charged by the railway company and paid by all shippers.* (Rau Rec., 261, 262, 264.)

5. The testimony of the shippers shows that they did not consent, or do anything from which their consent could be implied, to any restrictions or limitations on the common law liability of the carriers, and that they delivered their property to the railway company to be transported by it and the succeeding carriers to St. Louis and there delivered to the consignees, without asking any concession in the transportation charges and without any limitation of the liability of the carriers, relying upon the law for the security of their rights. The shippers testified that they had no knowledge whatever of the contents of the station receipts which were supplied long after their barley had been destroyed, or the rules and regulations on the back of them, and were not aware that there was anything contained in them which relieved the carriers from liability in case their property should be destroyed by fire.

VI.

OWNERSHIP OF THE BARLEY.

In the *Rau* case it is not disputed but that the ownership of the barley was in the petitioner at the time it was destroyed by fire. It is, however, contended by the Receiver that in the Huntting Elevator case the barley belonged to the consignee, the Teichman Commission Co., of East St. Louis, at the time it was destroyed by fire. At the commencement of the testimony before the master it was stipulated that the barley at the time it was destroyed by fire belonged to the Huntting Elevator Company. Later on in the proceedings, the court released the Receiver from the effect of this stipulation, and thereupon testimony was taken concerning the ownership of this barley. In respect to the ownership of the barley in the Huntting Elevator case, it appears that the Teichman Commission Co. made a bid of "56 net" on 5,000 bushels of barley, which was accepted; and another bid of "56 net" on 10,000 bushels, which was accepted; and in another telegram, the Huntting Elevator Company wired Teichman Commission Co.: "Please wire us best offer on 10,000 or 20,000 of our No. 3 sample barley, delivered St. Louis"; and the answer came back, "54 net," and the barley was sold. (Rau Rec., 294–302.) The Huntting Elevator Company paid all the freight charges on these shipments to St. Louis. That both parties treated these sales as a sale of barley to be delivered at St Louis clearly appears from their subsequent acts when the Teichman Commission Co. learned that a portion of the barley had been destroyed by fire. Immediately upon being notified of the fire the commission

company wrote the Huntting Elevator Company, under date of October 29, 1894, that there was a fire in the East St. Louis yards, and said: "We think likely some of *your barley* was amongst the cars destroyed." And later on when it was learned that some of the barley had been destroyed, the commission company wired the Huntting Elevator Company that all barley destroyed must be replaced; and immediately the elevator company wired back: "Will replace the barley." And the testimony and correspondence shows that the elevator company shipped other barley equal in quantity to that destroyed by fire to replace the barley so destroyed, in order to complete the sale which it had made to the Teichmnn Company of a certain amount of barley. (Rau Rec., 299, 300.) The president of the elevator company testified as follows:

"We shipped other barley to fill the sale.

Q. Why was this done?

A. We had made a sale of a certain amount of barley deliverable at St. Louis; the barley was not delivered and we supplied the deficiency.

Q. And so the subsequent shipment of barley was made in pursuance of a contract which you had with Teichmann Commission Co. to deliver to them at St. Louis a certain quantity of barley at certain prices?

A. Yes, sir." (Rau Rec., 295.)

The intention of the parties to a sale of personal property of course governs. The intention of the parties to this transaction is clearly apparent, and shows beyond all doubt that both parties treated this barley as belonging to the Huntting Elevator Company until it reached St. Louis, ready for delivery to the consignees there. The rule of law is tersely stated in the Am. & Eng. Ency. of Law, Vol. 21, p. 478, as follows:

"In determining whether title has or has not passed

by the contract, *the primary consideration is one of intention.* The agreement is what the parties intended to make it. If the intention is manifested clearly and unequivocally, it controls."

To this proposition the author cites cases from nearly all of the states as well as from the Federal courts. The rule everywhere is that *the intention of the parties must prevail.*

The master found that the petitioners were the owners of the barley at the time it was destroyed by fire (Rau Rec., 57, 58), and we submit that under the testimony it cannot seriously be claimed that they were not the owners of it.

VII.

THE CLAIM OF THE CHICAGO, MILWAUKEE AND ST PAUL RAILWAY COMPANY FOR CARS DESTROYED.

This claim rests on somewhat different grounds than do the claims for barley destroyed. Commercial necessities require that cars engaged in the freight carrying business of the country shall be exchanged between the various railway companies. This gives rise to a system of car bookkeeping between the companies, and the necessity for the rule, which all companies recognize and act under, that each company, upon making a delivery of a car not its own to a connecting line, shall report such delivery to the company owning the car, giving the number of the car, date of delivery and the company to which it has been delivered, and that until such delivery is so reported the car shall stand charged to the company last reported as having received it; and if destroyed while on the tracks of that company, such

company shall be liable therefor the same as it would be for any other property which it might have in its possession for transportation or delivery.

That this system of car bookkeeping and rule of liability prevailed between the Receiver's company and the Chicago, Milwaukee and St. Paul Railway Company there is no question under the testimony. Calvert, the Receiver's agent at East St. Louis, and Bradley, his car accountant, testified, as did Beecham, the car accountant of the St. Paul Company, to this system. (Rau Rec., 87, 89. 90, 91, 94, 139, 140.) The rule of liability for damaged or destroyed cars was testified to by both Mr. Beecham and Bosworth, the Receiver.

Mr. Beecham:

Q. Are you acquainted with the practice and custom which prevailed among the different railroads of the United States in respect to the settlement or payment for cars damaged or destroyed when in possession of companies not owning the cars?

A. Yes, sir.

Q. You may state what the practice or custom is.

A. The practice is for the company, through its master car-builder, for the companies on whose track the car is destroyed, to report such destruction to the owner of the car and to call for a history of the car, showing when it was built, and then they deduct a depreciation and salvage and settle direct with the owners of the car if they so elect, but they may—it is optional with them to rebuild the car.

Q. So the company in whose possession the foreign car is, in case that car is damaged or destroyed, either rebuilds the car or pays the company owning it?

A. That is the universal practice.

Q. Is that the way all settlements are made between different companies with respect to damaged and destroyed cars?

A. Yes, sir; it is.

Q. So that a car of the Chicago, Milwaukee and St.

Paul Railway Company, while in possession of the Chicago, Peoria and St. Louis Railway Company, if damaged or destroyed, the latter company would pay the St. Paul Company for it or rebuild the car?

A. Yes, sir.

Q. You say that is the custom and practice on which all settlements are made between the different companies?

A. Uniform practice and custom. (Rau Rec., 129.)

Mr. Bosworth:

Q. It is a custom between all railroads, if a car of the St. Paul Railway is destroyed on your track, that you pay for it?

A. Yes, sir.

Q. And that is on the ground that you have possession of the car, and in accounting for the loss of it you account to the owner and pay for it; that is a well understood custom, isn't it?

A. Yes, sir.

In this connection it should be stated that in pursuance of the custom which Mr. Beecham and Mr. Bosworth testified to, Mr. Bradley, the Receiver's car accountant, reported to Mr. Beecham under date of November 2, 1894, four days after the fire, the cars which had been destroyed by the fire belonging to the St. Paul Company (Rau Rec., 117, 118.) This is significant, for it shows that the car accountant regarded these cars as in the possession of the Receiver at the time they were destroyed and accordingly reported their loss to the car accountant of the St. Paul Company.

And by referring to the correspondence which passed between W. J. Hemphill, Receiver's superintendent, and J. N. Barr, suprintendent of the Chicago, Milwaukee and St. Paul Railway Company (Rau Rec. 123, 124, 125), it will be seen that, in pursuance of the practice above testified to, Suprintendent Hemphill reported to Superin-

tendent Barr a list of the cars destroyed in the fire and asked for certain information concerning them, in order that he might determine whether the Receiver should rebuild the cars or pay for the loss. This information was sent to him by Mr. Barr, as will be seen by his letter and statement enclosed, on pages 124, 125 of the record. This is significant and shows that the Receiver regarded the cars as in his possession.

There is likewise no dispute in the testimony concerning the possession of the particular cars in controversy. At the commencement of the taking of testimony it was formally agreed between the parties, by written stipulation signed and filed, that the thirty-eight cars in controversy were at the time of the fire standing on the tracks which the Receiver commonly used under his agreement with the Terminal Association. (Rau Rec., 103.) This puts at rest all questions concerning the actual possession of these cars. It should also be borne in mind that they they were not standing on these tracks for unloading there, but were awaiting orders for their further movement. The case, therefore, is not one where cars have been set on a private side-track of the consignee for unloading, in which event it might well be said they were not in the carrier's possession; but here they were in the Receiver's possession, on his tracks, awaiting further transportation. Besides this, it was an invariable rule for the Receiver to deliver to the Terminal Association a way-bill for every car delivered to that association. No way bill had been passed for any of the cars in controversy; no junction report han been sent to or received by the St. Paul Company for any of the cars. (Rau Rec., 90.) They all stood charged on the books of that company as being in the possession of the Receiver's Company.

Mr. Beecham testified:

Q. In whose possession were these cars I have spoken of—these thirty-eight cars—who were they charged to?
A. Chicago, Peoria and St. Louis Railroad. (Rau Rec., 93.)

The case, therefore, comes to this: That as between the Receiver's company and the St. Paul company, these cars were in the possession of the former company, and under the custom which had been established by long continued practice between the companies, it is liable for their value. If custom is to be considered in determining the liability for the contents of the cars, it should likewise be considered in respect to the cars themselves. And we submit that the testimony indisputably shows that the Receiver's company was a party to a custom or practice that fastens upon it a liability for these cars, and that it cannot evade that liability by showing that the consignees of the barley had arrangements with the Terminal Association for holding cars or giving them other facilities in its yards. Whether the Receiver's company knew of this arrangement is immaterial, so far as the rights of the St. Paul company are involved. It did know that these cars were on tracks which it had the use of, and that they were charged to it as being in its possession on the books of the St. Paul company. It, therefore, knew that under the rules and custom governing the exchange of cars between the various railway companies, that its liability for these cars would continue until it had made a delivery of them in the usual way that deliveries of cars were made at that place, and such delivery reported to the St. Paul company. Such delivery not having been made or reported, and the cars at the time of the fire being on tracks which the Receiver's company used under its agreement with the Terminal Association to give facilities for handling

and storing cars, it conclusively follows that the liability for these cars is with that company and not with the Terminal Association.

So far as the courts have had occasion to consider this question, they have held that a railway company is liable for the safe carriage and return of cars belonging to other companies which come into its possession in the usual course of business, the same as it is for any other property which it handles as a carrier or as a warehouseman. So long as cars of one company are in the possession of another company, that company is accountable for them as a carrier or as a warehouseman. If they have been set on a private delivery track belonging to the consignee, for loading or unloading, then they are not in the possession of the carrier, and consequently its liability is interrupted during the time they are so out of its possession (*Railway Co.* v. *Ry. Co.*, 123 Ill., 594); but if they are placed on the carrier's tracks for loading and unloading, the rule is different, and they will be regarded as in the possession of the carrier, its liability being that of a warehouseman only. (*Ry. Co.* v. *Rolling Stock Co.*, 136 Ill., 644.) We, therefore, come back to the question: Were these cars, as between the Receiver's company and the St. Paul company, in the possession of the former company at the time they were destroyed? If they were, then it is liable therefor, both under the rule of liability, which a long-continued practice and custom had created, and the decisions of the courts. We submit that, under the second subdivision of the stipulation of August 27, 1895 (Rau Rec., 103), and the rules and custom which prevailed between the two companies, under which deliveries of cars were made and reported and the accounts thereof kept, there can be no doubt as to where the possession of

these cars was at the time they were destroyed, or of the Receiver's liability.

The followeng cases bear upon this question:

Ry. Co. v. *Ry. Co.*, 109 Ill., 135.
Ry Co. v. *Ry. Co.*, 123 Ill., 594.
R. R. Co. v. *R. R. Co.*, 14 Allen, 462.
Ry. Co. v. *Rolling Stock Co.*, 136 Ill., 649.
Malory v. *Ry. Co.*, 39 Barb., 488.

VIII.

IN CONCLUSION.

This case could not be better stated in all its phases than is done in the dissenting opinion of Circuit Judge Jenkins, and it is urged upon this court to carefully examine and consider that opinion. It is in harmony with the case as presented by the record, it is in harmony with the succinct and able report of the master and the decrees entered thereon by Judge Allen at the Circuit, it is in harmony with the decisions of this and other courts, it is in harmony with the manifest justice of the case. The opinions of Circuit Judges Woods and Showalter are not only opposed to each other, but they are inconsistent with the decisions of this court, especially in the cases of *Pratt* v. *Ry. Co.*, 95 U. S., 43, and the Covington Stockyard case, 139 U. S., 128, and the decision of the United States Circuit Court of Appeals for the Second Circuit in *Texas & Pacific Ry. Co.* v. *Clayton*, 51 U. S. App., 676, and with the decisions of the state courts as announced in *Mount Vernon Co.* v. *Ala. G. S. Ry. Co.*, 92 Ala., 296, 298; *Palmer* v. *C. B. & Q. Ry. Co.*, 13

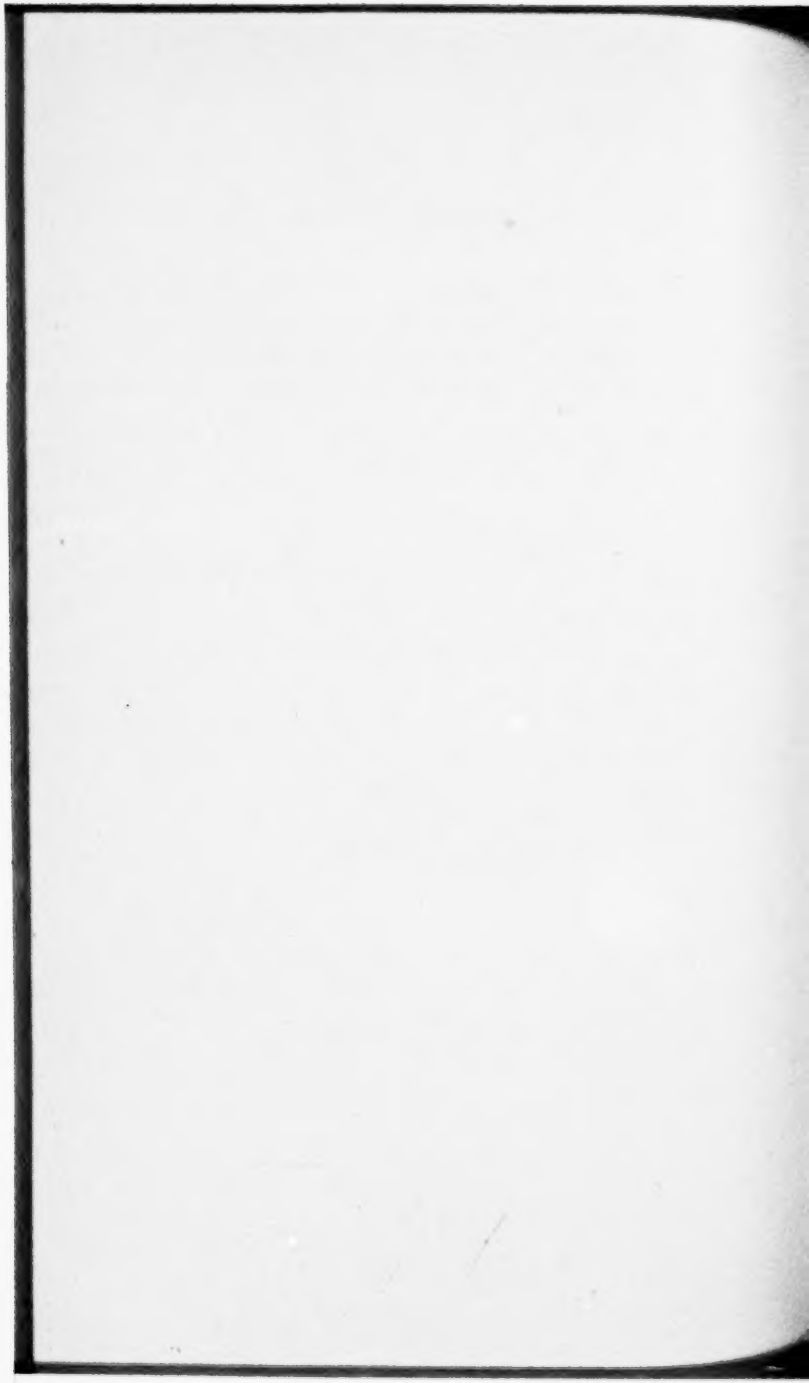
Atl. Rep., 818; *Ins. Co.* v. *Ry. Co.*, 55 Tenn. Repts., 268.

We submit that the reports of Mr. Stuart Brown, the master to whom these interventions were referred and the decrees of the Circuit Court entered thereon in favor of the petitioners, should be affirmed.

All of which is respectfully submitted.

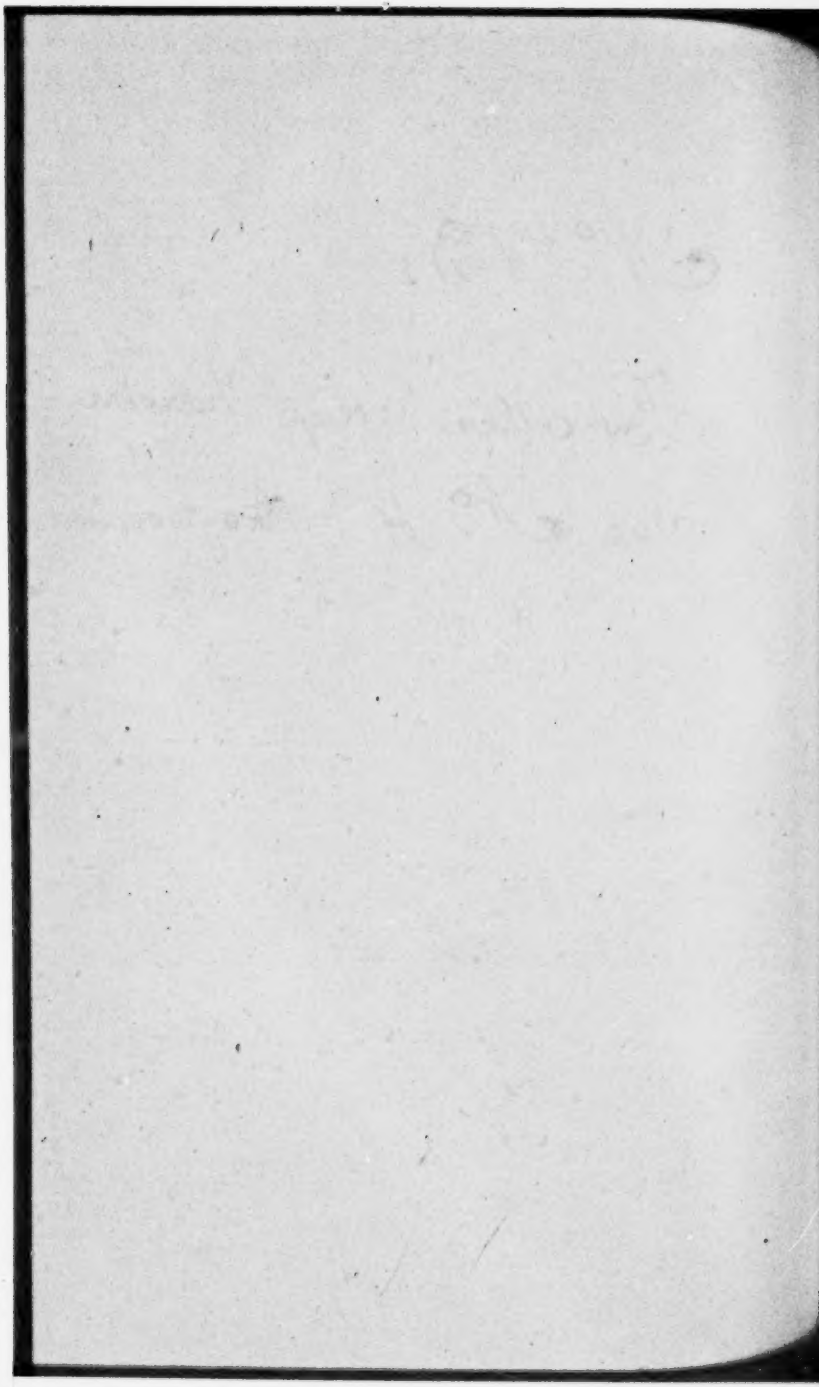
GEO. R. PECK,
GEO. P. CARY,
Solicitors for Petitioners.

BURTON HANSON,
Of Counsel.



No. 13.

For other Crops herein
See No. 11 _ this volume.



Supreme Court of the United States.

No. 13.—October Term, 1900.

Jacob Rau, Petitioner, *vs.* C. H. Bosworth, Receiver of the Chicago, Peoria and St. Louis Railway Company, et al.	On writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

[December 17, 1900.]

Mr. Justice White delivered the opinion of the Court.

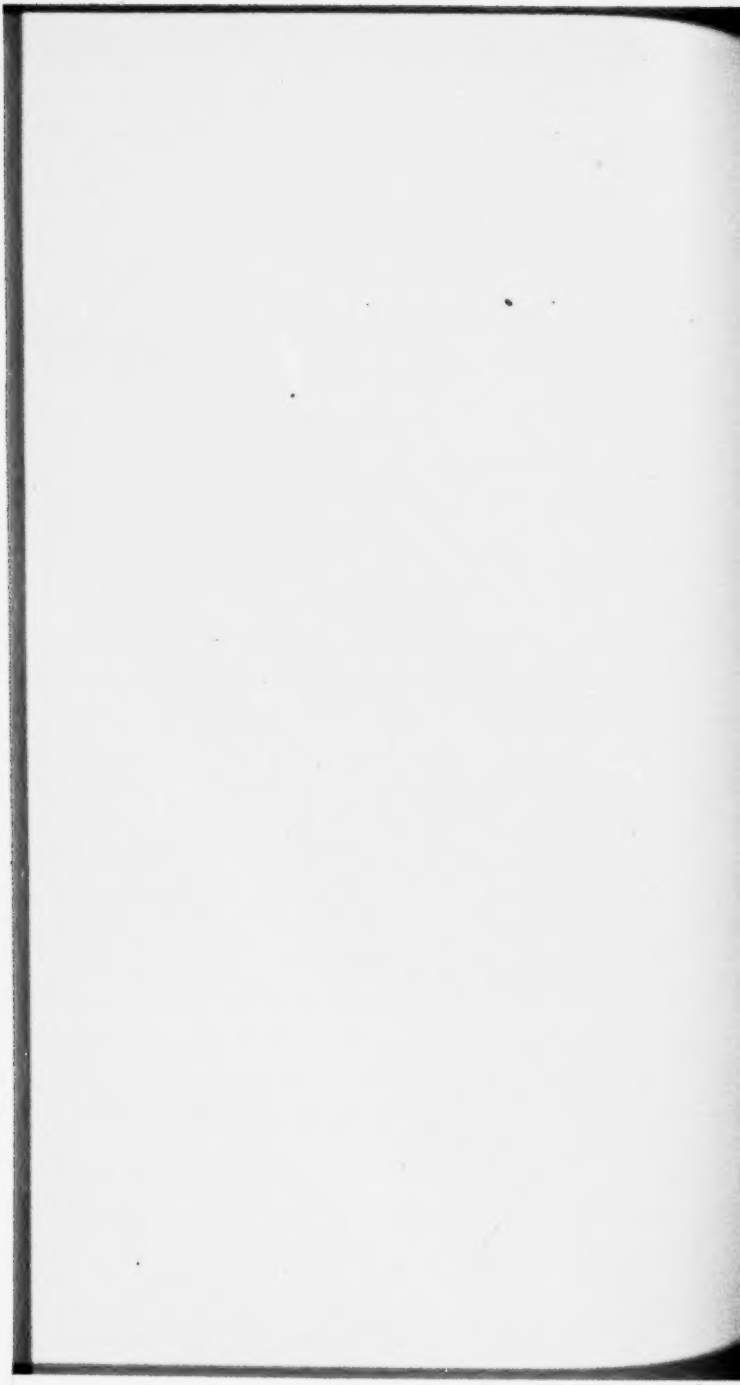
This is another of the claims in intervention which originated from the fire in a railroad yard at East St. Louis on the night of October 28, 1894, referred to in the opinion just delivered in *Huntting Elevator Company* v. *Bosworth*, number 12 of this term. The claim of Rau was for the value of two cars of barley shipped from Wykoff, Minnesota, consigned to the Orthwein Grain Company, St. Louis, to be sold for the account of the consignor. The cars were delivered by a connecting carrier to the Peoria Company and were deposited on its tracks in a portion of the Terminal Association yards at East St. Louis on the afternoon of October 25, 1894. While so held, awaiting orders for further movement, the cars and contents were destroyed by the fire in question.

The Circuit Court of Appeals reversed a decree which had been entered by the Circuit Court in favor of the claimant. Applying the principles declared in the opinion delivered in the Huntting Elevator Company case, *the decree of the Circuit Court of Appeals must be reversed and the decree of the Circuit Court of the United States for the Southern District of Illinois affirmed.*

True copy.

Test:

Clerk Supreme Court, U. S.



SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1917

No. 645

H. H. BOSWORTH, RECEIVER OF THE CHICAGO, P. AND ST. LOUIS RAILWAY, PETITIONER,

vs.

THE CARR, RYDER AND ENGLER COMPANY.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

PETITION FOR CERTIORARI FILED APRIL 30, 1917.

CERTIORARI AND RETURN FILED MAY 28, 1917.

(16,860.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1898.

No. 287.

C. H. BOSWORTH, RECEIVER OF THE CHICAGO, PEORIA AND ST. LOUIS RAILWAY, PETITIONER,

vs.

THE CARR, RYDER AND ENGLER COMPANY.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

INDEX.

	Original.	Print.
Caption	*a*	1
Extracts from transcript of record from circuit court of the United States for southern district of Illinois	24	1
Intervening petition of Carr, Ryder & Engler Co.	24	1
Report of master	59	4
Exhibit to report of master—Report of master on petition of T. Michael & Son	61	5
Exceptions of receiver to report of master	71	14
Decree, April 5, 1897	73	15
Petition of receiver for appeal	357	17
Assignment of errors by receiver	358	17
Bond on appeal of receiver	359	18
Order allowing appeal of receiver	360	19

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., SEPTEMBER 28, 1898.

	Original.	Print.
Petition of C., P. & St. L. R'y Co. to be made party, and for leave to appeal	360	20
Assignment of errors by C., P. & St. L. R'y Co	362	21
Bond on appeal of C., P. & St. L. R'y Co	363	22
Order making C., P. & St. L. R'y Co. party defendant and allowing appeal, &c	364	23
Decree, February 25, 1898	402	24
Writ of certiorari	407	24
Return to writ of certiorari	409	25
Stipulation as to return	411	25
Stipulation to omit parts of record in printing	412	26

a-23 *Transcript of Record.*

In the United States Circuit Court of Appeals for the Seventh Circuit, October Term, A. D. 1896.

MERCANTILE TRUST COMPANY
vs.
CHICAGO, PEORIA & ST. LOUIS RAILWAY COMPANY ET AL. } No. 454.

In the matter of the intervening petition of the Carr, Ryder and Engler Company.

C. H. BOSWORTH, Receiver, etc., Appellant,
vs.
CARR, RYDER AND ENGLER COMPANY, Appellee.

Mr. Bluford Wilson, Mr. Philip B. Warren, counsel for appellant.
Mr. George R. Peck, Mr. Burton Hanson, Mr. George P. Cary, counsel for appellee.

Transcript of record filed September 13, 1897.
Printed record filed Sep. 28, 1897.
OLIVER T. MORTON, *Clerk.*

* * * * * * *

24 Afterwards, to wit, on the twenty-first day of February, in the year of our Lord one thousand eight hundred and ninety-five, came the Carr, Ryder & Engler Co., by its solicitors, and filed in the clerk's office of said court its intervening petition, which is as follows, to wit:

Intervening Petition of the Carr, Ryder & Engler Co.

In the Circuit Court of the United States in and for the Southern District of Illinois.

THE MERCANTILE TRUST COMPANY OF NEW York, Complainant,
vs.
THE CHICAGO, PEORIA AND ST. LOUIS RAILway Company, Defendant. } Consolidated Cause.

Intervening petition of the Carr, Ryder & Engler Company.

To the honorable the judges of said court:

Comes now your petitioner, The Carr, Ryder & Engler Company, a corporation duly organized and existing under and by virtue of the laws of the State of Iowa, having its principal office and place of business at the city of Dubuque therein, and being a citizen of the said State of Iowa, intervening herein, and by leave of court first had and obtained, files this, its petition, and complaining of the

Chicago, Peoria and St. Louis Railway Company, a corporation duly organized and existing under and by virtue of the laws of the State of Illinois, and having its principal office and place of business at Springfield therein, states:

That on the 20th day of October, 1894, your petitioner at Dubuque, Iowa, delivered to the Chicago, Milwaukee and St. Paul Railway Company a quantity of manufactured doors, sash, blinds, and mouldings for the purpose of having the same transported by the said railway company and other lines of railroad from said Dubuque to Birmingham, Alabama; that said doors, sash, blinds and moldings were on the 24th day of said October loaded into a car of the Chicago, Rock Island and Pacific Railway Com-
25 pany, No. 1004, which said property so loaded into said car was consigned to May & Thomas Hardware Company, Birmingham, Alabama, by way of East St. Louis, which said property was of the value of seven hundred seventy-seven and $\frac{28}{100}$ dollars ($777.28); that said car containing said property was transported by said Chicago, Milwaukee and St. Paul Railway Company to its station at Rock Island, in the State of Illinois, the terminus of its line of railroad, and at that place the same was delivered to the Rock Island and Peoria Railroad Company, and by said last-named company transported to Peoria, in said State of Illinois, and there delivered to the Chicago, Peoria and St. Louis Railway Company, to be transported by it to East St. Louis, and there to be delivered to the next connecting line of railroad, and from thence to said Birmingham, Alabama; that said Chicago, Peoria and St. Louis Railway Company received said car containing said doors, sash, blinds, moldings, etc., and transported the same as far as East St. Louis, a station on its line of road, and while the same was still in transit and on its way to destination, and in the possession and under the control of the said Chicago, Peoria and St. Louis Railway Company, the said car containing said property was destroyed by fire on the evening of the 28th day of October, 1894, and said doors, sash, blinds, moldings, etc., of the value of seven hundred seventy-seven and $\frac{28}{100}$ dollars ($777.28), was totally destroyed, and on account of the loss and destruction thereof by fire as aforesaid, your petitioner has suffered damage to the amount of said seven hundred and seventy-seven and $\frac{28}{100}$ ($777.28) dollars. Your petitioner further states that said doors, sash, blinds, moldings, etc., belonged to it at the time it was so destroyed by fire, and that it was the sole owner thereof.

Your petitioner further shows that on the 21st day of September, 1893, in the suit of The Mercantile Trust Company of New York, complainant, against The Chicago, Peoria & St. Louis Railway Company, defendant, in the circuit court of the United States for the northern district of Iowa, Mr. C. H. Bosworth was, by an order duly entered therein, appointed receiver of and placed in charge of the property, rights and franchises of said defendant railway company, and as such receiver has ever since the date of his appointment been engaged in managing and operating the railroad of said defendant railway company in the transportation of persons and property over and upon the same, and that the liability of such railway company

to your petitioner was incurred while its railroad was being operated by said receiver, and that the claim and demand of your petitioner herein is of a kind and accrued within a time which entitles it to a priority over debts and demands secured by mortgages, and
26–58 to a payment by said receiver out of any funds which may come into his hands while operating the railroad of said defendant railway company.

Wherefore your petitioner prays that its said claim of seven hundred seventy-seven and $\frac{28}{100}$ dollars ($777.28) may be allowed against the said receiver appointed as aforesaid; that said claim be declared a lien paramount to all other claims against the property of said Chicago, Peoria & St. Louis Railway Company, prior in right to the claims of mortgages, and a lien upon any money in the hands of said receiver not otherwise appropriated, and that the said receiver be ordered to pay the said amount out of any moneys that may come into his hands, or out of the proceeds of the sale of the property of said railway company, before any distribution shall be made of the same, and for such other and further orders as to the court shall seem meet and proper.

THE CARR, RYDER & ENGLER COMPANY,
By E. A. ENGLER, *Its Vice-President.*

BURTON HANSON,
GEO. P. CARY, *Of Counsel.*

UNITED STATES OF AMERICA, } ss:
Northern District of Iowa, }

E. A. Engler, being duly sworn, deposes and says that he is vice-president of The Carr, Ryder & Engler Company, the intervenor herein; that he has read the foregoing petition, and knows the contents thereof; and that the matters alleged and set forth therein are true, as *I* verily believe.

E. A. ENGLER.

Subscribed and sworn to before me this 2d day of February, A. D. 1895.

J. R. LINDSAY,
Notary Public.

[SEAL.]

(Indorsed:) Filed February 21, 1895. James T. Jones, clerk.

* * * * * * *

59 Afterwards, to wit: on the 10th day of April in the year of our Lord one thousand eight hundred and ninety-six, came Stuart Brown, Esq., one of the masters of this court, and filed in the clerk's office of said court his report, on said intervening petition, which report is as follows, to wit:

Report of Master in Chancery.

In the Circuit Court of the United States for the Southern District of Illinois.

MERCANTILE TRUST COMPANY
vs.
CHICAGO, PEORIA & ST. LOUIS. } Consolidated Cause.

Intervening petition of the Carr, Ryder & Engler Co.

Your subscriber, one of the masters in chancery of this honorable court, to whom the said intervention in the above-styled cause has been referred, would respectfully report that he has taken evidence, heard oral argument and had briefs presented upon the questions raised by the proof, and herewith he offers his conclusions.

The Pleadings

are the same in effect as were set out in the report of your subscriber on claim of T. McMichael & Son, filed April 8, 1896, and to which reference is hereby made.

The difference is shown in the amended stipulation as to proof, which, in this intervention, was as follows: "That the petitioner, Carr, Ryder & Engler Company, is a corporation as alleged, having its place of business at the city of Dubuque, Iowa, and that on the 20th day of October, 1894, it delivered to the Chicago, Milwaukee & St. Paul Railway Company at said Dubuque the property mentioned in its petition filed herein, which property was consigned to May & Thomas Hardware Company, Birmingham, Alabama, by way of East St. Louis, Illinois, and was loaded in a car of the Rock Island & Peoria Railway Company, No. 1004, and was to be transported to destination pursuant to the bill of lading issued therefor, which bill of lading is attached to this stipulation marked Exhibit 'A,' and is made part hereof; that while said property was in
60 transit, it was destroyed by fire at said East St. Louis, on the 28th of October, 1894; that at the time it was so destroyed, the said petitioner was the owner thereof; that said property so destroyed was of the value of seven hundred seventy-seven dollars and $\frac{28}{100}$ ($777.28); and that said petitioner was damaged in said sum of $777.28 on account of said property having been so destroyed, and that the petitioner is entitled to recover that amount, with interest, if it shall be adjudged that it is entitled to recover in this proceeding."

This was all the evidence in this case, except that Felps, the agent of the Terminal R. R., testified that a waybill for said car on the day after the fire was offered to the Terminal R. R. by the receiver, and was refused by the Terminal on account of the damaged condition of the car.

Conclusion.

I find that this car, and its contents, were held by the receiver as a common carrier, and that intervenor has a just claim against said receiver in the sum of seven hundred and seventy-seven and $\frac{28}{100}$ dollars, with interest at the rate of 5 per cent. per annum from date of loss to this date, and that the same should be paid as the court may order.

All of which is respectfully reported this 7th day of April, 1896.

STUART BROWN, *M. C.*

(Indorsed:) Filed April 10, 1896. James T. Jones, clerk.

61 EXHIBIT TO REPORT OF MASTER.

T. McMichael & Son Report.

In the Circuit Court of the United States for the Southern District of Illinois.

MERCANTILE TRUST COMPANY *vs.* CHICAGO, PEORIA AND ST. LOUIS. } Consolidated Cause.

Intervening petition of Thomas McMichael and William McMichael, doing business under the firm name of T. McMichael & Son.

Report of Master.

To the Hon. William J. Allen:

Your subscriber, one of the masters in chancery of this honorable court, to whom the said intervention in the above-styled cause has been referred, would respectfully report that he has taken evidence, heard oral argument and had briefs presented upon the questions presented by the proof, and herewith he offers his conclusions.

The Pleadings.

An intervention filed January 26, 1895, alleges among other things that on the 16th day of October, 1894, the petitioners delivered to the Chicago, Milwaukee & St. Paul Railway Company four car-loads of barley in cars of said company, numbered 37506, 12336, 2598, 4126, and on the 19th day of the same month two other car-loads of barley in cars of said company, numbered 3728 and 18126; and on the 22d day of said month, two other car-loads of barley in cars of said company, numbered 10720 and 6842; also on the 6th of said month one car-load of barley in car of said company, numbered 26088, and on the 22d of said month, two other car-loads of barley in cars of said company, numbered 4268 and 7552; that all of said car-loads were consigned to Teichman Commission Company, St. Louis, Mo., via East St. Louis, Ills.; that all were transported by said C., M. & St. P. Company to Rock Island, Ill., and there deliv-

ered to the Rock Island & Peoria Railway Company, and by said last-named company transported to Peoria, Illnois, and delivered to the Chicago, Peoria & St. Louis Railway Company, and were by it transported as far as East St. Louis, and while still in transit and on their way to destination, and in the possession and under the control of said C., P. & St. L. R'y Co. the first-mentioned eight cars of barley and their contents were destroyed by fire on the
62 evening of the 28th day of October, 1894, and damage resulted to petitioners of $2,942.56; that the last-named three cars and the barley contained therein *was* partially destroyed by said fire, and after its disposal damaged petitioners $226.68, making a total loss or damage to said petitioners of $3,169.24; petitioners further allege that said barley belonged to them at the time it was so damaged, and that they were the sole owners thereof; petitioners ask for relief and that receiver pay said amount of $3,169.24 as a just claim prior to rights of mortgage bondholders.

On the 11th day of March, 1895, C. H. Bosworth, receiver, filed his answer, alleging that after delivery to the C., P. & St. L., and before the filing of the intervention, the said cars and their contents were delivered, in the due course of business, to the Terminal Railroad Association, of St. Louis, and while in their possession said cars were destroyed; and further that they were destroyed by a fire negligently caused by and originated in a spark coming from a certain engine belonging to and being operated by and in the service of the Terminal R. R. Association; and, further, while in the care and custody of said Terminal Association, under a contract whereby the Terminal railroad agreed to give the said receiver terminal facilities, handle trains, care for engines and freight, under a regular interchange of business and according to custom, exercising due care and caution, *but* said Terminal Association willfully and negligently stored said property in close proximity to a certain load of hay, which was fired by sparks from a certain passing switch-engine of said Terminal Association; and further said Terminal Association caused said fire, by storing said inflammable hay in a veritable fire-trap; receiver denies responsibility, and asks to have Terminal R. R. made a party defendant.

On May 13, 1895, Bosworth, receiver, files a cross-petition, stating that all property mentioned in interventions was in care and custody of Terminal Association under a contract by which said Terminal R. R. was to give receiver terminal facilities, etc., and it was the duty of said association to exercise due care and caution in safe keeping and handling said cars, but it willfully and negligently stored them in a dangerous place; that said cars were delivered to Terminal Association by receiver in due course of business, and while in the possession and under the care of said association were destroyed; and, although they allowed said cars mentioned in said interventions to be destroyed, they did save all of their said cars; asks for a rule to show cause why it should not be made a party defendant; June 1, 1895, rule entered, directed against Terminal R. R. Association, requiring it to show cause on or before June 15, 1895, why it should not be made a party defendant, etc.

63 June 15, 1895, Terminal R. R. Association by its solicitor, moves court to discharge rule of June 1st, for lack of jurisdiction and other reasons stated. No further action was taken on said rule and said Terminal R. R. Association was not made a party defendant.

August 27, 1895, a stipulation was entered into in this intervention (with others) by counsel for purposes of saving labor and expense of making proof, which said stipulation was afterwards, on January 23, 1896, amended by an order of court, and which stipulation was, in its amended form, as follows:

"That the petitioners, Thomas McMichael and William McMichael are partners engaged in business at McGregor, Iowa, under the firm name of T. McMichael & Son, as alleged, and that at the dates and times and at the place in their petition mentioned, they delivered to them Chicago, Milwaukee & St. Paul Railway Company eight (8) car-loads of barley, in cars, as stated in their petition, consigned to the Teichman Commission Company, St. Louis, Missouri, by way of East St. Louis, Illinois. That written receipts, of which Exhibits B. C. D. and E. attached to this stipulation are copies, were afterwards given by said railway company, as testified to by witnesses S. Y. Hyde and E. J. Tull. That said barley was destroyed by fire at said East St. Louis during the night of October 28, 1894; that said barley, at the time it was destroyed, belonged to the petitioners, and was of the value of twenty-nine hundred and forty-two dollars and $\frac{56}{100}$ ($2,942.56); that the petitioners were damaged in that sum, and are entitled to recover that amount, with interest, if it shall be adjudged that they are entitled to recover in this proceeding."

(This omits three cars partially destroyed as stated above.)

September 4, 1895, replication, general, to answer of defendants, filed as of March 15, 1895.

October 24, 1895, amendment to petition filed. Alleges for further ground of recovery that upon the arrival of the cars mentioned and described in said petitions at said East St. Louis, and while the same were still in the possession of said receiver, said receiver negligently caused and permitted them, together with their contents to be placed near a wooden warehouse open at sides and ends and filled with combustibles, etc.

November 18, 1895, amended answer of receiver filed. Denies cars were placed by defendant, while same were still in possession of defendant, negligently near warehouse; further expressly denies knowledge of character of said wooden warehouse, affirms they were delivered to and in custody of Terminal Association under contract, etc.; had no control over care, etc., affirms that in-
64 tervening petitioners had knowledge, through their assignees, of condition of affairs; further that the cars and contents remained in close proximity to wooden warehouse with full knowledge, approval and consent of the said intervening petitioners, through their agents, the consignees, and thus remained for the convenience of said assignees, and at their risk.

The Evidence as to Ownership and Shipment.

From the evidence it appears that the firm of T. McMichael & Son sold to Teichman & Company by sample, 15,000 bushels of barley in October, 1894, at 58 cents net per bushel in St. Louis, Missouri. The eleven cars specified by number in the petition were shipped from McGregor, Iowa, at the time named, over the C., M. & St. P. railway, and freight to St. Louis was paid by shippers. The cars were delivered to Rock Island & Peoria R. R. and by these to C., P. & St. L. at Peoria, Illinois.

From the evidence it would appear that the custom was to send a sample of barley by express to commission-house at St. Louis, which made a bid upon it. If the bid was accepted the grain was delivered to the C., M. & St. P. for delivery at St. Louis, via East St. Louis, subject to inspection and weighing.

These cars were transported to East St. Louis by the last-named railroad on November 2, 1894; W. R. Bradley car accountant of the C., P. & St. L., reported the first eight car numbers burned by fire at East St. Louis, October 28, and last three car numbers as damaged by fire at East St. Louis, October 28th.

On October 30th the consignee Teichman Commission Company wrote to shipper "We are convinced that several of *your cars* were in the lot of burned and damaged barley. We would now suggest that you give notice to your railroad at your end, to push the Jacksonville Southeastern line here, to adjust loss sustained, as speedily as possible."

On November 2d, the consignee telegraphs "Will you replace the burnt barley at once to fill sale?"

To which shipper answered:

"Yes, will load tomorrow."

On November 2d, consignee writes as follows:

"We are in receipt of your telegram saying you will replace your barley lost by the late fire; we now have the assurance of the receiver of the J. & S. E. R. R., that they are amply able and anxious to settle the loss of barley by fire, as speedily as possible, which, however, may be delayed by the question arising if the barley is covered by their insurance policy, or by the one held by the Terminal Railway Company, which will soon be determined, as
65 that company is co-operating with the J. S. & E. R. R. to effect an adjustment.

On November 3rd, the shipper writes consignee:

"We have made bill for cars X X X and sent same to C., M. & St. P. R. R., and presume they will pay us as soon as they look it up."

Conclusions as to Ownership.

Notwithstanding the stipulation of August 27, 1895, quoted above, the claim is now made that petitioners are not the owners of this barley, but have parted with their title to consignee. Taken in its barest legal sense, delivery is made by a vendor when he gives

up his goods to a common carrier for transportation. Even law courts, however, do not hold this rule without exception, but where there is anything to be done as of weighing or measuring, they hold the performance of these things on a condition precedent. These were goods sold by sample and the vendee had the right to refuse to accept them if not up to grade. But further, it is very apparent from the acts of the parties that they intended the barley to be delivered at St. Louis. The shipper's willingness to assume the responsibility of an action against the carriers is not, of course, conclusive, but the intention of the parties is clearly displayed by the correspondence after the loss of the consignment where both shipper and consignee immediately act upon the understanding that it was the shipper's loss and that the carrier was the shipper's agent. The object in a court of equity is moreover to discover the true owner of these goods and not the technical owner, and where the parties in interest agree as to ownership of goods, the carrier is amply protected in any payment he may make.

My conclusion is that intervenors have properly brought suit.

Custom as to Barley.

It is contended by counsel for defendant that the liability of the receiver cannot be greater than that of warehouseman. This contention is not raised in the answer to the original petition, but may be considered as raised by the answer to the amended petitions. It is, of course, entirely inconsistent with the defense that the car had been delivered to the Terminal Railroad Association, for if they held them as warehousemen, then they had not delivered them. Still, however, admitting the question is subject to discussion, the burden of proof, is in such case most certainly cast upon the carrier;

66 its liability as an insurer continued until the cars had reached their destination and been unloaded or placed in a safe warehouse, or place for unloading.

Porter v. Chicago & R. I. R. R., 20 Ill., 407.
C. & N. W. R. R. Co. v. Bensley, 69 Ill., 630.

The destination of the cars was St. Louis, Missouri (see stipulation).

Wabash R. R. v. Jaggerman, 115 Ill., 407.

and it is very uncertain whether consignee, under the circumstances, even if notice to him had been given, could prejudice the rights of the owner by any change of destination. I am of the opinion that either the receiver or the Terminal railroad held the barley as a common carrier. Having reached that conclusion, it is unnecessary to discuss the degree of care exercised.

Do the limitations in the bills of lading or shipping receipts enure to the benefit of connecting carrier?

Certainly not in this case. In the case cited by counsel for defendant, *R. R. Co. v. Mfg. Co.*, 16 Wallace, 318, and which was delivered in a State where no laws had been passed as to limitations of liability the court says: "It is not only against the policy of the

law, but a serious injury to commerce to allow the carrier to say that the shipper of merchandise assents to the term proposed in a notice, whether it be general to the public or special to a particular person, merely because he does not expressly dissent from them." But by the laws of Iowa, the shipping point, and by the laws of Illinois, the place of loss, common carriers are prohibited from limiting their common-law liability in any receipt.

Further, it developed from the evidence that the bills of lading as shown, were given subsequent to the destruction of property and simply as evidence of shipment.

"After the goods are shipped, it is too late to impose upon the shipper a cause exempting the carrier from liability from loss by fire, after such fire has occurred."

Lamb v. Camden & A. R. Co., 4 Daly, 483.

I am therefore forced to the conclusion that the owners of this barley have a just claim for its value from one of the common carriers who have transported it, or agreed to transport it.

The evidence is conclusive that the barley was safely carried by C., M. & St. P. to Rock Island and from there carried by the Rock Island & Peoria, to Peoria, Illinois; where it was delivered to the C., P. & St. L. and by it transpo[illegible]ed to East St. Louis.

The sole question then remains was it delivered by the C., P. & St. L. to the Terminal Railroad Association, for further carriage.

What is the evidence as to

67 *Delivery.*

The barley in question was carried by the C., P. & St. L. to the end of its track proper. There is no connection between that point and the Eads bridge or Wiggins ferry leading to St. Louis, Missouri. The old C., P. & St. L. R. R. having no terminal facilities in East St. Louis for the forwarding of freight prior to the receivership, made an agreement with the Terminal Railroad Association of St. Louis, to furnish the needed facilities. This agreement was made June 1, 1891, and -as never formally re-enacted by the receiver, but his testimony shows that he ratified its and was and is now doing business under it. It provided for the handling of C., P. & St. L. trains, cars of its engines and cars, and the handling and care of freight at the rate of fifty cents for each loaded car and regular freight charges. By it, the Terminal railroad agreed to furnish the necessary yard room, or track facilities, switch-engines, and yard-men in making up and breaking up all freight trains, &c. The course of business under this agreement was for the C., P. & St. L. to carry its freight to the end of its own tracks proper, and then upon certain Y tracks which belong to the Terminal railroad; here the engine of the C., P. & St. L. to carry it- was cut off, and the Terminal engines broke up and the train deposited its cars upon certain tracks in the Terminal yards. These tracks of deposit were not exclusively used by the C., P. & St. L., but the cars seem to have been always placed upon them. A wooden warehouse through

which these tracks ran or was near to was not used at the time of the fire by the C., P. & St. L. railway, but was used by a commission company for the storage of bailed hay. This warehouse was, as the evidence shows, a dangerous fire-trap.

From the statement of Calvert, the agent of the C., P. & St. L. at East St. Louis, it appears that the cars containing this barley came to the Y tracks on the following dates:

4126 on October 25, 1894.	10720 on October 26, 1894.
2598 on October 25, 1894.	6842 on October 26, 1894.
12336 on October 26, 1894.	4268 on October 26, 1894.
3728 on October 26, 1894.	7552 on October 26, 1894.
18126 on October 26, 1894.	37506 on October 26, 1894.

Two arrived there on the third day before the fire, nine on the second day, and one on the night before.

On the night of Sunday, October 28th, the fire broke out in the wooden warehouse about 11 p. m., and consumed it, together with the cars in controversy, and many others. The origin of the fire does not appear from the evidence, but it is supposed to have resulted from sparks of a passing engine communicated to the hay in
68 the warehouse and fanned by a high wind. Evidence admitted under objection showed that the Terminal railroad attempted to save its own cars first, and would not allow agents of the C., P. & St. L. to direct the movement of engines. The evidence as to course of business further showed that when cars were set on these deposit tracks, they remained there until a waybill was prepared by the agents of the C., P. & St. L., directing their transfer or forwarding to some other point. When this waybill was presented to the Terminal railroad, its engines again took hold of the cars designated, and placed them wherever the waybill ordered. When this waybill was presented to the Terminal railroad, then, and not until then, the car accountant of the C., P. & St. L. made out a junction report. Junction reports *in* was shown were a general custom of railroads, and were simply a postal card sent to and informing the railroad, which had originated a car of freight, that a car, designated by a certain number, had been delivered to a connecting carrier by the railroad sending the card. Their purpose, of course, being to keep track of cars.

The evidence in this case shows that no waybill for these cars was given to the Terminal R. R., nor was any junction report sent to the C., M. & St. P.

The evidence further shows that no notice was sent to the owner, shipper or consignee of the arrival of said cars at St. Louis, or of the delivery of them to the Terminal railroad.

The evidence also shows that Calvert, the local agent of the C., P. & St. L. made a claim against the insurance company for the value of these cars and contents stating that the fire occurred on October 28, 1894, and consumed this freight in transit. Also that salvage operations were carried on by the C., P. & St. L., and the result paid to the shipper. Also, that the cars damaged and not entirely destroyed by said fire, were repaired at the cost of the C., P. & St. L.

railroad and returned to their owners. The evidence, however, also shows that the receiver ordered insurance claims to be filed because of the time limit imposed by the insurance policies, and that he made salvage and repaired cars after demand upon the Terminal R. R. to do same, and with the understanding that his action should not prejudice any claim he might have against the said Terminal Association.

Whatever bearing these admissions may have with relation to the shippers I have not considered.

69 *Conclusions.*

It may be assumed that the rule in America is that the obligation of a common carrier of goods is to carry them over its own line and safely deliver to the connecting carrier, and, if there is a necessity for storage, it is considered a mere accessory to transportation.

R. R. v. Mfg. Co., 16 Wallace, 318.

The burden of proof is upon the carrier to show that at the time of loss, without negligence on his part, his liability as insurer had terminated.

P. & P. N. v. C., R. I. & P., 109 Ill., 135.
R. R. v. Mfg. Co., 16 Wall., 318.
Schulter v. Adams Exp. Co., 5 Mo., 316.

The question to be determined is whether anything remains to be done by the carrier in completion of its contract to safely carry and deliver.

Gregg v. Ill. Cent., 147, 556.

"It is very clear that the simple deposit of the goods by the carrier in his depot, unaccompanied by any act indicating the intention to renounce the obligation of a carrier, will not change or modify even his liability."

R. R. v. Mfg. Co., 16 Wall., 318.

Notice must be given consignee.

Carrier who receives goods for further transportation continues liable as carrier until they are received by another carrier, or until he in some way distinctly renounces responsibility.

Conkey v. M & St. P. R. R. Co., 31 Wis., 619.

Judging this case by the above rules, did anything remain to be done by the C., P. & St. L.?

Was the intention to renounce its obligation indicated by any act?

Was notice given to consignee? Did C., P. & St. L. distinctly renounce its responsibility?

Were the goods left in the sole control of the Terminal railroad?

Under the evidence these questions must be answered adversely to the receiver.

The tracks set apart for the use of the receiver were, as far as this controversy goes, his own. They were his by the agreement
70 of leasing. They were not a destination point. It was not intended nor was it feasible to unload there. After the cars reached that point, they could not be controlled nor taken away by the Terminal railroad, which was simply one of the instruments used by receiver in his carriage of freight. It was only by the further act of the receiver or his agents that the cars could be moved at all. It was not in the power of the Terminal railroad under the lease to change his order of things, whereas, the receiver might at any moment have terminated his responsibility by issuing a waybill, directing the further carriage of the cars to their proper destination.

The supreme court of Illinois have, it is true, in Smyser case, 38th Illinois, said that the mere signing of a bill of lading alone does not transfer freight, but that is evidence of transfer; they were speaking of the original shipment, and of the initial carrier. In such a case, the acceptance of freight of course controls. So in the case at bar—no bill of lading was issued by the C., M. & St. P., but they accepted the freight and became a carrier by their own act. The Terminal railroad did not however accept this freight at East St. Louis. They had no opportunity to do so.

So in *Pratt v. Grand Trunk*, 5 Otto, 43.

Where there was a joint possession and a definite place for deposit of goods destined for transportation, the court properly says, that the goods were under the control of the agents of the R. R. Co.; that they were deposited and received for transportation; that no further orders were expected.

So also, in *Merriam v. Hartford R'y Co.*, 24 Conn., 354, it was held that if a common carrier agree that property may be deposited in a certain place without notice to him, such deposit alone is sufficient delivery, and such agreement may be shown by a constant practice and usage.

But in the case at bar, the facts were the direct converse of these above-recited cases. The usage and custom was shown to require a waybill or special notice.

This case likens itself to the case of *Mt. Vernon Car Co. v. Alabama G. S. R. Co.*, 92 Ala., 296.

I quote from Ray on Freight Carriers:

"The placing of a car by an initial carrier on the side track of the connecting carrier, without giving the latter any notice, and without marking it with the name and address of the consignee, or sending any waybill or shipping directions does not establish the relation of contractors between the initial and the connecting carrier."

The reason of such a rule is apparent on a moment's reflection. What order or system could be maintained if the hundreds
71 of cars that pour into such a terminal point were without direction? It is also significant in this connection that the junction reports, that the evidence shows were made when a transfer took place, were not made for these cars.

I reach the opinion that the intervenors have a just claim against

the receivers in the sum of $3,169.24, and interest at 5 % from loss, and that it should be paid as the court may order.

All of which is respectfully reported this 7th day of April, 1896.

STUART BROWN, *M. C.*

And afterwards, to wit: on the 27th day of April, in the year last aforesaid, came again the receiver, and filed in the clerk's office of said court, his exceptions to the report of the master, which exceptions are in the words and figures following, to wit:

Exceptions of Receiver.

In the Circuit Court of the United States for Southern District of Illinois.

MERCANTILE TRUST COMPANY
vs.
CHICAGO, PEORIA & ST. LOUIS RAILWAY Company. } Consolidated Cause.

In the matter of the intervening petition of Carr, Ryder & Engler Company.

Exceptions of the Receiver to the Master's Report.

Now comes C. H. Bosworth, receiver herein, and excepts to the report of Stuart Brown, master in chancery, filed in the above-entitled cause, on the 10th day of April, 1896, and for cause of exception shows:

First. For that the said master has reported that the car and contents were held by the receiver as a common carrier, and that intervenor has a just claim against said receiver in the sum of $777.28, with interest thereon, at the rate of five per cent. per annum from date of loss to April 7, 1896, and that the same should be paid as the court may direct; whereas, the said master should
72 have reported that said car and its contents were not held by the receiver, either as a common carrier, or a warehouseman, or in any other capacity at the time of its loss and damage by fire, and that intervenor was not entitled to recover from the receiver by reason of said loss and damage.

Second. For that the said master has failed and refused to report that the contents of said car, at the time of its damage and destruction, had been delivered by the receiver to the Terminal Railroad Association of St. Louis, in the due course of business, and was then under the complete charge and control of said Terminal Railroad Association.

Third. For that the said master has found and reported that the said receiver was liable to the intervenor, as a common carrier, under his contract for the transportation of the goods in question; whereas, the said master should have found and reported from the evidence, that the said receiver, as a common carrier, had in all respects complied with his contract of carriage, by safely transporting and deliv-

ering the said grain to East St. Louis, and there depositing it in the customary and usual place for delivery, on tracks designated for that purpose in the yards of the Terminal Railroad Association of St. Louis, and for that reason was fully discharged from all liability in respect to the loss of said goods by fire.

Fourth. For that the said master has failed and refused to report that the contract of carriage, under which said goods were shipped, constituted a specific contract, containing a clause exempting the car-ier from liability for loss by fire, and that the benefit of said contract enured to each of the connecting carriers, including the receiver.

And thereupon this receiver prays that the said master's report be annulled and set aside, and that a decree may be entered on said intervening petition, dismissing the same at petitioner's cost.

C. H. BOSWORTH, *Receiver.*

By BLUFORD WILSON AND
P. B. WARREN,
His Solicitors.

(Indorsed:) Filed April 27, 1896. James T. Jones, clerk.

* * * * * * *

73 Afterwards, to wit: on the 5th day of April, in the term and year last aforesaid, the following further proceedings were had in said court in said cause, and entered of record, to wit:

Decree, April 5, 1897.

In the Circuit Court of the United States for the Southern District of Illinois.

THE MERCANTILE TRUST COMPANY OF NEW York, Complainant, *vs.* CHICAGO, PEORIA & ST. LOUIS RAILWAY COMpany *et al.*, Defendants.	In Equity. Consolidated Cause.

In the matter of the intervening petition of Carr, Ryder and Engler Company.

And now on the 5th day of April, A. D. 1897, came again the said intervenor, Carr, Ryder and Engler Company, by Burton Hanson and George P. Cary, its counsel, and the said Mercantile Trust Company of New York by Bluford Wilson, its counsel, and also C. H. Bosworth, receiver herein, by Bluford Wilson and P. B. Warren, his counsel, and this cause coming on to be further heard upon the exceptions of the said C. H. Bosworth, receiver, to the report of the master in chancery herein, and the court having heard argument of counsel, and being sufficiently advised, doth order and adjudge and decree that said exceptions be, and they are hereby overruled, and the report of said master is in all things confirmed.

74–356 It is further ordered, adjudged and decreed by the court that said C. H. Bosworth, receiver, pay as a part of the expenses of his receivership, within ninety days from the entry of this decree, the said sum found to be due to said intervenor, Carr, Ryder and Engler Company, to wit: the sum of seven hundred and seventy-seven dollars and twenty-eight cents ($777.28), with interest thereon at the rate of five per cent. (5%) per annum from the 10th day of April, 1897, the date of the filing of the master's report, to the entry of this decree, making a total of principal and interest the sum of eight hundred and fifteen dollars and twenty-eight cents, and costs, exclusive of clerk's fee, amounting to sixteen dollars and — cents, making a total of principal, interest and costs of eight hundred and thirty-one dollars and twenty-eight cents ($831.28).

It is further ordered, adjudged and decreed that inasmuch as the aforesaid amount is properly chargeable to the expenses of the receivership of C. H. Bosworth herein, this decree for the payment of said amount to said intervenor, Carr, Ryder and Engler Company be and the same is hereby adjudged to be a lien upon all the property and income of said defendant, Chicago, Peoria & St. Louis Railway Company, as it existed and was known during said receivership, in favor of the intervenor, Carr, Ryder and Engler Company, and upon all of the property and income of the purchaser or purchasers, purchased at the foreclosure sale heretofore had, their successors or assigns.

It is further ordered, adjudged and decreed that said lien be and the same is hereby adjudged to be a lien upon all the property and income of said defendant, Chicago, Peoria & St. Louis Railway Company, its said purchaser or purchasers, their successors or assigns, prior and superior to the lien of the mortgage given by said defendant railway company to the Mercantile Trust Company of New York, and to any and all mortgages that may have been placed upon said property by said defendant, or said purchaser or purchasers, their successors or assigns, or which may hereafter be placed upon said property.

And the court having in the original decree and confirmation of sale thereunder specially reserved the right of caption of the property of said Chicago, Peoria & St. Louis Railway Company to enforce the payment of the sum or sums that might be decreed to be liens on said property, it is further ordered, adjudged and decreed that if said amount herein adjudged and decreed to be paid to said intervenor, Carr, Ryder and Engler Company, is not paid within the time herein limited, the said C. H. Bosworth, as receiver, is hereby directed to take possession of all of said railroad property, together with its income, rolling stock and real estate, and operate the same, and out of the net earnings pay the amount due on this decree to Carr, Ryder and Engler Company.

* * * * * * *

357 *Petition of Receiver for Appeal, April 5, 1897.*

In the Circuit Court of the United States for Southern District of Illinois.

MERCANTILE TRUST COMPANY
vs.
CHICAGO, PEORIA & ST. LOUIS RAILWAY Company. } Consolidated Cause.

In the matter of the intervening petition of the Carr, Ryder and Engler Company.

Petition for Appeal.

The petition of C. H. Bosworth, receiver herein, showeth unto your honor that a final decree was entered in the above-entitled cause on the 5th day of April, 1897, whereby it was ordered, adjudged and decreed that your petitioner should pay to the said Carr, Ryder and Engler Company the sum of $777.28; your petitioner further states to your honor that he has assigned errors upon the record in said cause, specifying errors, as he alleges, in the record and decree aforesaid. He therefore prays that your honor will grant an appeal from the said judgment and decree to your petitioner, upon condition that he enters into bond in the sum of five hundred dollars, with surety to be approved by this honorable court, in such time as your honor shall order and decree.

C. H. BOSWORTH, *Receiver,*
By BLUFORD WILSON,
PHILIP BARTON WARREN,
His Solicitors.

358 *Assignment of Errors by Receiver.*

In the Circuit Court of the United States for Southern District of Illinois.

MERCANTILE TRUST COMPANY
vs.
CHICAGO, PEORIA & ST. LOUIS RAILWAY Company. } Consolidated Cause.

In the matter of the intervening petition of the Carr, Ryder and Engler Company.

Assignment of Errors.

And now comes C. H. Bosworth, receiver herein, by Bluford Wilson and P. B. Warren, his solicitors, and says there is manifest error in the record and proceedings in the above-entitled judgment and decree; and specifies the following, to wit:

1. The court erred in overruling the exceptions filed by the receiver to the report of the master.

2. The court erred in failing and refusing to sustain the exceptions filed by the receiver to the report of the master.

3. The court erred in ordering and adjudging that the petitioner was entitled to a valid and first lien on the property of the defendant railway company ahead of the mortgage indebtedness, and upon all of the property and income of the purchasers, purchased at the foreclosure sale of said railway property.

4. The court erred in failing and refusing to order, adjudge and decree that the claim of the intervenor was not entitled to a valid and first lien on the property of the defendant railway company, ahead of the mortgage indebtedness, and upon all of the property and income of the purchasers, purchased at the foreclosure sale of said railway property.

5. The court erred in ordering, adjudging and decreeing that said receiver pay to the intervening petitioner the sum of $777.28 with interest thereon from the date of the filing of the master's report, together with the costs in this case.

6. The court erred in ordering, adjudging and decreeing that if said amount was not paid by the receiver within the time there limited, the said receiver be directed to take possession of all of said property and operate the same, and out of the net earnings, pay said amount.

Whereby, the plaintiff in error prays that said judgment and decree be reversed and annulled, with directions to the lower court to dismiss said intervening petition.

BLUFORD WILSON,
PHILIP BARTON WARREN,
Solicitors for C. H. Bosworth, Receiver.

(Indorsed:) Filed April 5, 1897. James T. Jones, clerk.

359 *Bond for Appeal by C. H. Bosworth, Receiver.*

In the Circuit Court of the United States for Southern District of Illinois.

MERCANTILE TRUST COMPANY
vs.
CHICAGO, PEORIA & ST. LOUIS RAILWAY COMPANY. } Consolidated Cause.

In the matter of the intervening petition of the Carr, Ryder and Engler Company.

Bond.

Know all men by these presents, that we, C. H. Bosworth, as receiver of the Chicago, Peoria & St. Louis Railway Company as principal, and Bluford Wilson as surety, are held and firmly bound unto the Carr, Ryder and Engler Company in the penal sum of five hundred dollars, for the payment of which, well and truly to be made, the said receiver, as such, binds himself and his successor,

and the said surety binds himself, his heirs and personal representatives, jointly and severally, by these presents.

Dated this 31st day of May, 1897.

The condition of this obligation is such that whereas, on the 5th day of April, 1897, in the circuit court of the United States, for the southern district of Illinois, in the above-entitled cause, it was ordered, adjudged and decreed by the court that the above-bounden C. H. Bosworth, as receiver, should pay over to the said Carr, Ryder and Engler Company the sum of $777.28 and from which decree the said receiver has appealed to the United States circuit court of appeals for the seventh circuit, and upon the condition that the receiver should enter into bond in the sum of five hundred dollars with surety to be approved by the court.

Now, therefore, if the said receiver shall well and truly, without delay, prosecute the said appeal with effect, and shall pay all costs and damages that may be adjudged against him, by reason of said appeal, and all costs that may accrue therein in case of dismissal of said appeal by appellant, then this obligation to be null and void, otherwise to remain in full force and effect.

C. H. BOSWORTH,
As Receiver of the Chicago, Peoria & St. Louis Railway Company. [SEAL.]
BLUFORD WILSON. [SEAL.]

Approved:
WILLIAM J. ALLEN,
United States District Judge.

360 *Order Allowing C. H. Bosworth, Receiver, an Appeal and Approving Bond.*

In the Circuit Court of the United States for Southern District of Illinois.

MERCANTILE TRUST COMPANY
vs.
CHICAGO, PEORIA & ST. LOUIS RAILWAY COMPANY. } Consolidated Cause.

In the matter of the intervening petition of the Carr, Ryder and Engler Company.

Order Allowing Appeal and Approving Bond.

Now on this first day of June, 1897, the same being one of the days of the January term, A. D. 1897, of this court, comes C. H. Bosworth, receiver herein, and files his petition for appeal from the order and decree of the court entered herein on the 5th day of April, 1897; and it appearing to the court that said petition is in due form, it is hereby

Ordered, adjudged and decreed that the prayer of said petition be, and the same is hereby granted; that the appeal be, and the same is hereby allowed to said C. H. Bosworth, receiver, from the said order and decree of April 5th, 1897, to the United States circuit

court of appeals for the seventh circuit, upon the said C. H. Bosworth, as such receiver, entering into bond in the sum of five hundred dollars, with surety to be approved by this court; which bond it appears to the court is herewith submitted and approved.

Petition of the C., P. & St. L. R'y Co.

In the Circuit Court of the United States, Southern District of Illinois.

MERCANTILE TRUST COMPANY ET AL. *vs.* CHICAGO, PEORIA & ST. LOUIS RAILWAY COMPANY *et al.* } Consolidated Cause.

In the matter of the intervening petition of the Carr, Ryder and Engler Company.

Application of the Chicago, Peoria & St. Louis Railroad Company of Illinois to be Made Party Defendant and for Leave to Appeal.

Now comes the Chicago, Peoria & St. Louis Railroad Company of Illinois, and shows to his honorable court that on the 10th
361 day of July, 1895, a decree was entered in the original foreclosure cause pending in this court, in which The Mercantile Trust Company *et al.* were complainants, and The Chicago, Peoria & St. Louis Railway Company *et al.* were defendants, for the foreclosure and sale of all the property of said defendant railway company; that in and by said decree it was provided, among other things, that the purchasers of said property and their assigns might be made parties to all intervening petitions filed in such original cause, and might also appeal from any decree that might be entered in this court upon said intervening petitions; that on the 21st day of September, 1895, pursuant to said decree of foreclosure and sale, Stuart Brown, Esq., as master commissioner, sold said property to a reorganizing committee, and pursuant to a decree of this court entered herein on the 1st day of February, 1896, executed a deed to said property to the assignees of said reorganization committee, to wit: the Chicago, Peoria & St. Louis Railroad Company of Illinois; your petitioner further respectfully shows that in and by said decree of February 1, 1896, it was provided that the said Chicago, Peoria & St. Louis Railroad Company of Illinois, shall be substituted in place of said reorganization committee as a party to this cause, and shall have the right to appear herein and to procure and defend such proceedings as it may be advised for the protection of its interests; and shall have all the other rights and privileges to which, under said decree of foreclosure and the order confirming the sale thereunder, the purchaser at such sale is entitled.

Your petitioner further respectfully represents unto this court, that on the 5th day of April, 1897, a final decree was entered in the above-entitled cause, directing C. H. Bosworth, receiver, to pay to said intervening petitioner the sum of $777.28; and this petitioner further

represents unto this court that it has assigned errors, which it charges were made by this court against it in the matter of said intervening petitions, particularly specifying the errors complained of, and now here presents said assignment of errors to be filed with the clerk of this court; and

Thereupon, this petitioner prays that it may be made a party to said intervening petition, and that this court will grant to it an appeal from said final decree; and that the amount of bond and the time within which such bond and certificate of evidence shall be filed may be fixed by this court.

CHICAGO, PEORIA & ST. LOUIS RAILROAD COMPANY OF ILLINOIS,
By BLUFORD WILSON, *Its Solicitor.*

(Indorsed:) Filed July 17, 1897. James T. Jones, clerk.

362 *Assignment of Errors by the C., P. & St. L. R'y Co.*

In the Circuit Court of the United States for Southern District of Illinois.

MERCANTILE TRUST COMPANY
vs.
CHICAGO, PEORIA AND ST. LOUIS RAILWAY Company. } Consolidated Cause.

In the matter of the intervening petition of the Carr, Ryder and Engler Company.

Assignment of Errors.

And now comes the Chicago, Peoria and St. Louis Railroad Company of Illinois, by Bluford Wilson and P. B. Warren, its solicitors, and says there is manifest error in the record and proceedings in the above-entitled judgment and decree; and specifies the following, to wit:

1. The court erred in overruling the exceptions filed by the receiver to the report of the master.

2. The court erred in failing and refusing to sustain the exceptions filed by the receiver to the report of the master.

3. The court erred in ordering and adjudging that the petitioner was entitled to a valid and first lien on the property of the defendant railway company ahead of the mortgage indebtedness, and upon all of the property and income of the purchasers purchased at the foreclosure sale of said railway property.

4. The court erred in failing and refusing to order, adjudge and decree, that the claim of the *inventor* was not entitled to a valid and first lien on the property of the defendant railway company ahead of the mortgage indebtedness, and upon all of the property and income of the purchasers, purchased at the foreclosure sale of said railway property.

5. The court erred in ordering, adjudging and decreeing that said

receiver pay to the intervening petitioner the sum of $777.28, with interest thereon from the date of the filing of the master's report, together with the costs in this case.

6. The court erred in ordering, adjudging and decreeing that if said amount was not paid by the receiver, within the time there limited, the said receiver be directed to take possession of all of said property and operate the same, and out of the net earnings pay said amount.

Whereby, the plaintiff in error prays that said judgment and decree be reversed and annulled, with directions to the lower court to dismiss said intervening petition.

BLUFORD WILSON,
PHILIP BARTON WARREN,
Solicitors for Chicago, Peoria and St. Louis Railroad Company of Illinois.

(Indorsed:) Filed July 17, 1897. James T. Jones, clerk.

363 *Bond on Appeal of the C., P. & St. L. R'y Co.*

In the Circuit Court of the United States for Southern District of Illinois.

MERCANTILE TRUST COMPANY *vs.* CHICAGO, PEORIA & ST. LOUIS RAILWAY COMPANY. } Consolidated Cause.

In the matter of the intervening petition of the Carr, Ryder and Engler Company.

Bond.

Know all men by these presents, that we, the Chicago, Peoria & St. Louis Railroad Company of Illinois, as principal, and Bluford Wilson as surety are held and firmly bound unto the said Carr, Ryder and Engler Company in the penal sum of five hundred dollars, for the payment of which, well and truly to be made, the said Chicago, Peoria & St. Louis Railroad Company of Illinois as such binds itself and its successor, and the said surety binds himself, his heirs, and personal representatives, jointly and severally by these presents.

Dated this 17th day of July, 1897.

The condition of this obligation is such that whereas, on the 5th day of April, 1897, in the circuit court of the United States for the southern district of Illinois, in the above-entitled cause, it was ordered, adjudged and decreed by the court that the above-bounden Chicago, Peoria & St. Louis Railroad Company of Illinois should pay over to the said Carr, Ryder and Engler Company the sum of $777.28, and from which decree the said Chicago, Peoria & St. Louis Railroad Company of Illinois, has appealed to the United States circuit court of appeals for the seventh circuit, and upon the condi-

tion that the Chicago, Peoria & St. Louis Railroad Company of Illinois should enter into bond in the sum of five hundred dollars, with surety approved by the court:

Now therefore, if the said Chicago, Peoria & St. Louis Railroad Company of Illinois shall well and truly, without delay, prosecute the said appeal with effect, and shall pay all costs and damages that may be adjudged against it by reason of said appeal, and all costs that may accrue therein in case of dismissal of said appeal by appellant, then this obligation to be null and void, otherwise to remain in full force and effect.

CHICAGO, PEORIA & ST. LOUIS RAILROAD COMPANY OF ILLINOIS,
By F. W. HUIDEKOPER, *Pres't.* [SEAL.]
BLUFORD WILSON. [SEAL.]

Attest: CHAS. D. MEYER, *Secretary.* [SEAL.]

Approved:
WILLIAM J. ALLEN,
United States District Judge.

(Indorsed:) Filed July 17, 1897. James T. Jones, clerk.

364–401 *Order Making C., P. & St. L. R'y Co. Party Defendant, Allowing Appeal, and Approving Bond.*

In the Circuit Court of the United States, Southern District of Illinois.

MERCANTILE TRUST COMPANY ET AL.
vs.
CHICAGO, PEORIA & ST. LOUIS RAILWAY COMPANY *et al.* } Consolidated Cause.

In the matter of the intervening petition of the Carr, Ryder and Engler Company.

Order of Court Making the Chicago, Peoria & St. Louis Railroad Company of Illinois Party Defendant, and Granting Leave to Appeal from Final Decree.

This cause coming on to be further heard upon the application of the Chicago, Peoria & St. Louis Railroad Company of Illinois to be made a party defendant to the above-entitled intervening petition, and for leave to appeal from the decree entered in this cause on the 5th day of April, 1897, and the court being fully advised in the premises, upon consideration thereof, does hereby grant leave unto said Chicago, Peoria & St. Louis Railroad Company of Illinois to be made party defendant to said intervening petition; and does also hereby grant unto said Chicago, Peoria & St. Louis Railroad Company of Illinois an appeal from said final decree of this court to the circuit court of appeals of the United States for the seventh circuit, upon the said Chicago, Peoria & St. Louis Railroad

Company of Illinois entering into bond in the sum of five hundred dollars ($500.00) with approved surety.

* * * * * * *

402–406 And afterwards, on the same day, to wit, on the twenty-fifth day of February, 1898, in the October term last aforesaid, the following further proceedings were had and entered of record, to wit:

FRIDAY, *February* 25, 1898.

Before Hon. William A. Woods, circuit judge; Hon. James G. Jenkins, circuit judge; Hon. John W. Showalter, circuit judge.

MERCANTILE TRUST COMPANY
vs.
CHICAGO, PEORIA & ST. LOUIS RAILWAY COMPANY ET AL. } 454.

In the matter of the intervening petition of Carr, Ryder & Engler Company.

C. H. BOSWORTH, Receiver, etc., Appellant,
vs.
CARR, RYDER & ENGLER COMPANY, Intervenor.

Appeal from the circuit court of the United States for the southern district of Illinois.

This cause came on to be heard on the transcript of the record from the circuit court of the United States for the southern district of Illinois, and was argued by counsel.

On consideration whereof it is now here ordered, adjudged, and decreed by this court that the decree of the said circuit court in this cause be, and the same is hereby, affirmed with costs.

* * * * * * *

407 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable the judges of the United States circuit court of appeals for the seventh circuit, Greeting:

[Seal of the Supreme Court of the United States.]

Being informed that there is now pending before you a suit in which C. H. Bosworth, as receiver of the Chicago, Peoria & St. Louis Railway Company, and The Chicago, Peoria & St. Louis Railway Company are appellants and Carr, Ryder and Engler Company is appellee, No. 454, which suit was removed into the said circuit court of appeals by virtue of an appeal from the circuit court of the United States for the southern district of Illinois, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said circuit court of appeals
408 and removed into the Supreme Court of the United States, do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said

cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the tenth day of May, in the year of our Lord one thousand eight hundred and ninety-eight.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

409 UNITED STATES OF AMERICA, *Seventh Circuit,* } *ss:*

In obedience to the command of the foregoing writ of certiorari and in pursuance of the stipulation of the parties, a full and true copy of which is hereto attached, I do hereby certify and return that the transcript of the record filed with the application to the Supreme Court of the United States for a writ of certiorari in the case of C. H. Bosworth, receiver of the Chicago, Peoria & St. Louis Railway Company, and The Chicago, Peoria & St. Louis Railway Company, appellants, and Car-, Ryder & Engler Company, appellee, is a full, true, and complete transcript of the record upon which said cause was heard in the United States circuit court of appeals for the seventh circuit, together with all proceedings in said court.

In testimony whereof I hereunto subscribe my name and affix the seal of said United States circuit court of appeals for the seventh circuit, at the city of Chicago, this 18th day of May, A. D. 1898.

[Seal United States Circuit Court of Appeals, Seventh Circuit.]

OLIVER T. MORTON,
Clerk United States Circuit Court of Appeals for the Seventh Circuit.

410 [Endorsed:] Case No. 16,860. Supreme Court of the United States. No. 287, October term, 1898. C. H. Bosworth, receiver, &c., *vs.* Carr, Ryder & Engler Company. Writ of certiorari and return. Filed May 18, 1898. Oliver T. Morton, clerk. Office Supreme Court U. S. Filed May 26, 1898. James H. McKenney, clerk.

411 In the United States Circuit Court of Appeals for the Seventh Circuit, October Term, A. D. 1897.

MERCANTILE TRUST COMPANY
vs.
CHICAGO, PEORIA & ST. LOUIS RAILWAY COMPANY ET AL.

In the matter of the intervening petition of Carr, Ryder & Engler Company.

C. H. BOSWORTH, Receiver, etc., Appellant,
vs.
CARR, RYDER & ENGLER COMPANY, Appellee.

It is stipulated by and between the parties hereto, by their respective counsel, that the certified copy of the transcript of record in

this cause filed by the clerk of this court in the Supreme Court of the United States in the application there made for a writ of certiorari in this cause there entitled C. H. Bosworth, receiver, *vs.* The Carr, Ryder & Engler Company, No. 647, October term, 1897, shall be taken as a return to the writ of certiorari granted by said Supreme Court in said cause on the 10th day of May, A. D. 1898.

Dated May 16, 1898.

BLUFORD WILSON,
PHILIP BARTON WARREN,
Solicitors for C. H. Bosworth, Receiver.
GEO. R. PECK,
BURTON HANSON,
Solicitors for Carr, Ryder & Engler Company.

Endorsed: United States circuit court of appeals, seventh circuit. Mercantile Trust Company *vs.* Chicago, Peoria & St. Louis Railway Company. In the matter of the intervening petition of Carr, Ryder & Engler Company. C. H. Bosworth, receiver, etc., appellant, *vs.* Carr, Ryder & Engler Company, appellee. Stipulation. Filed May 18, 1898. Oliver T. Morton, clerk.

412 In the Supreme Court of the United States, October Term, A. D. 1898.

MERCANTILE TRUST COMPANY
vs.
CHICAGO, PEORIA & ST. LOUIS RAILWAY COMPANY ET AL. } No. 287.

In the matter of the intervening petition of the Carr, Ryder & Engler Company.

C. H. BOSWORTH, Receiver Chicago, Peoria & St. Louis Railway Company, Petitioner,
vs.
CARR, RYDER & ENGLER COMPANY, Respondent.

Stipulation for Printing Portions of the Record.

Whereas certain portions of the transcript of record in the above-entitled cause and the cause entitled "Jacob Rau, petitioner, *vs.* C. H. Bosworth, receiver of the Chicago, Peoria & St. Louis Railway Company, respondent, No. 285, October term, A. D. 1898," of this court, such as the amended intervening petition, the answer thereto, as well as the answer to the original intervening petitions, the entire evidence taken, the opinion of the judges of the circuit court of appeals, as well as various other matters, rulings, proceedings, and doings, are in all respects identical:

Now, therefore, for the purpose of saving to the parties the expense of printing the entire transcript of record in the above-

entitled cause, it is stipulated and agreed that the entire
413 transcript of record in the aforesaid Rau case shall be printed, and that only the following portions of the record in the above-entitled cause shall be printed, to wit:

1. Intervening petition found on page 24 and succeeding pages of the transcript of record and proceedings in United States circuit court of appeals for the seventh circuit, filed in the above-entitled cause in this court, in the matter of the application for a writ of certiorari.

2. Report of master, found on pages 59 and 60 of said transcript of record.

3. Exhibit to said master's report, entitled T. McMichael & Son report, found on page 61 and succeeding pages of the transcript of record in the aforesaid Rau case.

4. Exceptions to master's report, found on page 71 and succeeding pages of said transcript of record.

5. Decree, found on page 73 of said transcript of record.

7. Petition for appeal, found on page 357 of said transcript of record.

8. Assignment of errors by receiver, found on page 358 of said transcript of record.

8½. Appeal bond of said receiver, found on page 359 of said transcript of record.

9. Order allowing receiver's appeal, found on page 360 of transcript of record.

10. Petition of Chicago, Peoria & St. Louis Railway Company to be made a party and for leave to appeal, found on pages 360 and 361 of said transcript of record.

11. Assignment of errors by said railroad company, found on page 362 of said transcript of record.

12. Appeal bond of said railway company, found on page 363 of said transcript of record.

13. Order making said railway company party and granting appeal, found on page 364 of said transcript of record.

14. Decree of United States circuit court of appeals, found on page 405 of said transcript of record.

414 It is further stipulated and agreed that this cause shall be heard and considered by this court upon the transcript of record in the aforesaid Rau case, No. 285, October term, 1898, of this court, in connection with such portions of the transcript of record in the above-entitled cause as shall be printed under this stipulation, and that the amended intervening petition, the answer thereto, as well as the answer to the original intervening petition, the entire evidence taken, the opinion of the judges of the circuit court of appeals, as well as various other matters, rulings, proceedings, and doings as contained and found in the transcript of record in the aforesaid Rau case, shall for all purposes be treated and con-

sidered the same as if they had been printed and included within the printed transcript of record in the above-entitled cause.

Dated July 14th, 1898.

BLUFORD WILSON,
P. B. WARREN,
Counsel for Petitioner.
GEORGE R. PECK,
BURTON HANSON,
Counsel for Respondent.

415 [Endorsed:] Case No. 16,860. Supreme Court U. S., October term, 1898. Term No., 287. C. H. Bosworth, rec'r, &c., petitioner, *vs.* The Carr, Ryder & Engler Company. Stipulation to omit parts of record in printing. Filed July 23, 1898.

Endorsed on cover: Case No. 16,860. U. S. C. C. of appeals, seventh circuit. Term No., 287. C. H. Bosworth, receiver of the Chicago, Peoria and St. Louis railway, petitioner, *vs.* The Carr, Ryder and Engler Company. Filed April 28, 1898.

Supreme Court of the United States

OCTOBER TERM, 1897

EDGEWORTH, RECEIVER OF THE CHICAGO, PEORIA & ST. LOUIS RAILWAY,

Petitioner,

vs.

THE CARR, RYDER & ENGLER CO.

Respondent.

Petition for Writ of Certiorari

TO

THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BLUFORD WILSON AND
PHILIP BARTON WARREN,
Solicitors for Petitioner.

Supreme Court of the United States

October Term, 1897

C. H. BOSWORTH, RECEIVER OF THE CHICAGO, PEORIA & ST. LOUIS RAILWAY,
Appellant,

vs.

THE CARR, RYDER & ENGLER COMPANY,
Appellee.

Petition for Certiorari.

To the Supreme Court of the United States of America:

The petition of C. H. Bosworth, receiver of the Chicago, Peoria & St. Louis Railway Company for a writ of certiorari, directed to the United States Circuit Court of Appeals for the Seventh Judicial Circuit, under the provisions of Section six of the Act of Congress, approved March 3d. 1891, and ordering that the records in a certain appeal be certified to this honorable court for its review and determination; said appeal is entitled as follows: "C. H. Bosworth, receiver Chicago, Peoria & St Louis Railway Company, appellant, vs The Carr, Ryder & Engler Company, appellee; No. 454; October Term, A. D. 1896; United States Circuit Court of Appeals, for the Seventh Circuit"

Statement of Case.

Your petitioner further respectfully shows to this honorable court, as follows:

That pursuant to an order duly entered in the United States Circuit Court for the Southern District of Illinois, in a cause therein pending wherein the Mercantile Trust Company, et al, were complainants and the Chicago, Peoria & St. Louis Railway Company, et al, were defendants, he was appointed receiver of all of the property of said defendant railway company, and immediately took possession thereunder, and from that time until the first day of February, 1896, he was in the possession and operation, as such receiver, of the railroad and property of said defendant railway company.

That on the 21st day of February, 1895, the Carr, Ryder & Engler Company, by its solicitors, filed its intervening petition in the said cause of the Mercantile Trust Company against the Chicago, Peoria & St. Louis Railway Company; that in and by said intervening petition, it was alleged that the petitioner was a corporation existing under and by virtue of the laws of the State of Iowa, with its principal office at the city of Dubuque; that on the 20th day of October, 1894, the petitioner delivered at Dubuque, Iowa, to the Chicago, Milwaukee & St. Paul Railway Company, a quantity of manufactured doors, sash, blinds, etc.,

for the purpose of having the same transported by the said railway and connecting lines of railroad, from Dubuque, Iowa, to Birmingham, Alabama; that on the 24th day of October, 1894, the said doors, sash, blinds, etc., were loaded into a car of the Chicago, Rock Island and Pacific Railway Company, number 1004, and consigned to the May & Thomas Hardware Company, Birmingham, Alabama, by way of East St. Louis, Illinois; that said property was of the value of $777.28; that said car was transported by the said Chicago, Milwaukee & St. Paul Railway Company to Rock Island and delivered to the Rock Island & Peoria Railway Company, and by said last named company transported to Peoria, and there delivered to the Chicago, Peoria & St. Louis Railway Company, to be transported by it to East St. Louis, and there to be delivered to the next connecting line of railroad, and so on to its destination; that said Chicago, Peoria & St. Louis Railway Company received said car and transported the same as far as East St. Louis, a station on its line of railroad, and while the same was still in transit and on its way to destination, and in the possession and under the control of said Chicago, Peoria & St. Louis Railway Company, the said car and property were destroyed by fire on the evening of the 28th day of October, 1894, and that the petitioner suffered damage to the amount of the value of said sash, doors, blinds, etc., namely, $777.28.

Said intervening petition further alleges the appointment of C. H. Bosworth as receiver of the Chicago, Peoria & St. Louis Railway, and that at the time he was operating said property, the liability of such railway company to the petitioner was incurred; and is of such a nature as entitles it to a priority over debts and demands secured by the mortgages

To this intervening petition, C. H. Bosworth, as receiver, filed his answer on the 11th day of March, 1895, in which he denied that at the time said car and contents were destroyed by fire, they were in his possession, custody or control; and further answering the said receiver alleged that after the said cars had been delivered to him, and before their destruction by fire, they were delivered to the Terminal Railroad Association of St. Louis; that at the time of their destruction by fire, they were in the sole custody, care and control of said Terminal Railroad Association, under a certain agreement between the Chicago, Peoria & St. Louis Railway Company, and the said Terminal Railroad Association, by which the latter contracted to give to the former terminal facilities at East St. Louis and to handle and care for its freight, including the property mentioned; and further answering, alleged that the property mentioned in said intervening petition, was in the care of the said Terminal Association in the course of a regular interchange of business with that Association, in accordance with the custom

that had been in force for the past four years, by which it became and was the duty of said Terminal Association to exercise due care and caution in the safe keeping and handling of said cars and freight, while in the custody and control of the same; and further alleging, that the Terminal Association wilfully and negligently, stored the said property in close proximity to a certain lot of bailed hay, which hay was fired by sparks from a certain passing switch engine belonging to the said Terminal Association, which fire was communicated to the property mentioned in said intervening petition; and further answering alleged, that in addition to the property described in said intervening petition, more than forty cars and their valuable contents were either wholly destroyed or damaged; further answering, the receiver denied that the petitioner was entitled to the relief, or any part thereof, demanded.

Your petitioner further respectfully represents that on the 27th day of August, 1895, for the purpose of saving the labor and expense of making proof, it was stipulated by the parties that the said Carr, Ryder & Engler Company is a corporation, as alleged, having its place of business at the city of Dubuque, Iowa; that on the 20th day of October, 1894, it delivered to the Chicago, Milwaukee & St. Paul Railway Company, at Dubuque, the property mentioned in its petition, consigned to the May & Thomas Hardware Company, at

Birmingham, Alabama, by way of East St. Louis, and was loaded in a car of the Rock Island & Pacific Railway Company, No. 1004, and was to be transported to destination, pursuant to the bill of lading issued therefor, which bill was attached to the stipulation; that while said property was in transit it was destroyed by fire at East St. Louis on the evening of the 28th day of October, 1894; that at the time it was destroyed the petitioner was the owner, and that the property was of the value of $777.28; and petitioner was damaged in that sum, and shall be entitled to recover that amount, if it shall be adjudged that it is entitled to recover in this proceeding.

C. H. Bosworth, receiver, your petitioner in this application, further respectfully shows unto this court that, after the facts were stipulated to as above set out, both parties proceeded to the taking of testimony as to the question of whether or not at the time the loss occurred, the property was in the possession of your petitioner, as such receiver. On this point the evidence shows that, after your petitioner received said car at Pekin, Illinois, he hauled the same to a point immediately beyond the terminus of his own rails at East St. Louis, and placed said car on certain "Y" rails of the Terminal Railroad Association, reaching that point about 3 o'clock on the afternoon of October 28th, 1894; that the servants of the Terminal Railroad Association of St. Louis, in the usual course of em-

ployment by that company, then hauled the car to a certain customary halting place on the premises of their employer; using for the purpose an engine which be longed to their employer; here they left said car stationary, until the evening of that day, when it was destroyed by fire; and that in the usual course of business the Terminal Association, after obtaining from the receiver a way-bill or memorandum, indicating the ultimate destination of said car, would have hauled the same over its own rails in East St. Louis, or over rails subject to its control for that purpose, and delivered the same to a carrier on whose rails the transit south was to continue.

Your petitioner further represents that said evidence further showed that the Terminal Railroad Association in fact took, and at the time of the loss, had the actual physical custody and care of the property; that the haul over the tracks of the Terminal, from the point where the receiver's servants parted from the car, to the point where the loss occurred, was a portion of the transit to be made in any case, no matter what the ultimate destination of the car might be; that for the purpose of moving the car thus far the information as to the ultimate destination, which a way-bill would have given was not needed; that no way-bill had up to that time been delivered, but that it does not appear that the lack of the information contained in such way-bill contributed in any

way to the loss; that it further appeared that in the carrying business conducted by the Terminal Association the car in question would remain stationary for a time, and thereafter be hauled, probably with other cars, grouped for the purpose, to the starting place of the carrier who was to take it south; that information as to the ultimate destination and route had not as yet been actually imparted by the receiver to the Terminal Association, but that the latter was content for the time being, to treat such information, then in the possession of the receiver, as sufficiently available to itself.

C. H. Bosworth, the petitioner in this application, further respectfully represents unto this honorable court, that on the 10th day of April, 1896, the Master in Chancery, to whom said intervening petition was referred, filed his report, in which he found that the said car and its contents were held by the receiver as a common carrier at the time of its loss; and that the intervener had a just claim against said receiver in the sum of $777.28.

C. H. Bosworth, your petitioner in this application further respectfully represents unto this honorable court, that on the the 27th day of April, 1896, he filed his exceptions to the said master's report; that the same were overruled, and said report approved on the 3d day of March, 1897; that on the 5th day of April, 1897, a decree was entered by the United States Cir-

cuit Court for the Southern District of Illinois, affirming the said master's report and ordering said receiver to pay to intervening petitioner the said sum of $777.28 with interest.

C. H. Bosworth, your petitioner in this application, further represents unto this honorable court, that on the 5th day of April, 1897, he prayed for, obtained and perfected an appeal to the United States Circuit Court of Appeals for the seventh Circuit from the said decree of the United States Circuit Court for the Southern District of Illinois, and duly assigned his errors on the record.

C. H. Bosworth, your petitioner in this application further respectfully shows unto this honorable court, that said appeal came on for hearing in said Circuit Court of Appeals before their Honors, Judges Woods, Jenkins and Showalter, and was argued in said court, and subsequently, on the 25th day of February, 1898, the said Circuit Court of Appeals handed down its decision wherein and whereby the said decree of the United States Circuit Court for the Southern District of Ilinois was affirmed, his Honor, Judge Showalter, dissenting therefrom; a copy of which opinion is attached to the transcript of record certified to this court.

That thereafter, on or about the 25th day of March, 1898, your petitioner filed his petition in said Circuit Court of Appeals for a rehearing, which petition was

subsequently on or about the 1st day of April, 1898, overruled, a copy of which petition is also attached to the transcript of record certified to this court.

C. H. Bosworth, your petitioner in this application, further respectfully shows unto this honorable court that a great number of intervening petitions were filed in the foreclosure cause pending in the United States Circuit Court for the Southern District of Illinois, for claims arising out of this same fire; that the Master in Chancery of the Circuit Court found him liable in each and every of the cases; that for the purpose of avoiding the expense of an appeal in each and every case, it was agreed between counsel that four different cases should be appealed, and stipulations were entered into that the other cases should abide the result of those cases thus appealed; that of the other cases appealed all three involved shipments of barley to grain brokers, for sale on the grain exchange in St. Louis; that in the trial it was shown that an agreement existed between these grain brokers and the Terminal Railroad Association, by which the latter was to hold such barley in store on its tracks in East St. Louis until the same could be sold; that by reason of this agreement, among other things, the Circuit Court of Appeals reversed the decree of the Circuit Court entered in the three other appeals; that all four of these appeals were submitted to and were considered by the Court of Appeals at one hearing and

one opinion rendered to cover all; that in that opinion the court of appeals declared that inasmuch as the agreement as to barley had no application to the Carr, Ryder & Engler case, the decree of the Circuit Court in favor of that company was right; the Court of Appeals was of the opinion that though in the physical possession of this particular car, (in the case at bar) the Terminal Association had not become responsible as a carrier therefor, because it had not been put in possession of a way-bill or other form of information on which it could proceed with the carrying

C. H. Bosworth, your petitioner in this application, further respectfuliy represents unto this honorable court, that the question of delivery of freight between connecting carriers involves a grave and important question of law; that the question as to whether a terminal railroad in switching cars is a common and connecting carrier is also a grave and important question which has never been directly decided by this hororable court; that the decision of the said Court of Appeals is at variance with the decision of this honorable court, and that the errors made therein can only be authoritively corrected in this honorable court; and as to the matters so at variance, as well as to divers other matters, the said decision of the said Circuit Court of Appeals for the Seventh Circuit contains manifest errors of law; and that it is the province of this honorable court to harmonize said conflicting decisions and correct the errors therein.

Your petitioner further respectfully shows unto this honorable court that he has filed herewith and made a part of this application his assignment of variance and of error; and that he has also caused a certified copy of the transcript of the record in this case to be made, and that the same is also filed herewith as a part hereof.

Whereupon your petitioner respectfully prays that this honorable court may be pleased to grant a writ of certiorari, requiring the case entitled "C. H. Bosworth, receiver Chicago, Peoria & St. Louis Railway Company, appellant. vs. the Carr, Ryder & Engler Company, appellee; No. 454; October Term. A D 1896; United States Circuit Court of Appeals for the Seventh Circuit" to be certified to this honorable court for its review and determination.

C. H. BOSWORTH, *Receiver*,
Chicago, Peoria & St. Louis Railway,
By Bluford Wilson
Philip Barton Warren.
His Solicitors.

Assignment of Variance.

And now comes C. H. Bosworth, receiver Chicago, Peoria & St. Louis Railway, by Bluford Wilson and Philip Barton Warren, his solicitors, and says there is manifest variance in the judgment and decree rendered by the United States Circuit Court of Appeals for the Seventh Judicial Circuit aforesaid, with the judgments

and decrees of this the honorable Supreme Court of the United States of America in like cases, and specifies the following to-wit:

First.

That in the case at bar the court says: (Op. p. 12)

> "Though in physical possession, under its agreement with the receiver, of the car in which the goods were to be transported, the Terminal Association had not become responsible as a carrier therefore, because it had not been put in possession of a way-bill, or other form of information on which it could proceed with the carriage."

While in *Pratt vs. Grand Trunk Railway Co., 95 U. S., 43*, this honorable court holds that where by custom or agreement there is a designated place of deposit between two connecting carriers, delivery is made by such deposit, although shipping directions had not as yet been given from the first to the second carrier.

Wherefore the said C. H. Bosworth, receiver Chicago, Peoria & St. Louis Railway Company, petitioner herein, prays a writ of certiorari requiring the aforesaid cause to be certified to this honorable court for its review and determination.

Benford Wilson
Philip Barton Marr

Solicitors for Petitioner.

Assignment of Errors.

And now comes C. H Bosworth, receiver, Chicago, Peoria & St. Louis Railway Company, Appellant, by Bluford Wilson and Philip Barton Warren, his attorneys, and says that in the record and proceedings, and in rendering the decree aforesaid, there is manifest error in this, to-wit:

1. The Court of Appeals erred in affirming the decree of the Circuit Court adjudging the petitioner to be entitled to a valid and first lien on the property of the defendant railway company ahead of the mortgage indebtedness, and upon all of the property and income of the purchasers, purchased at the foreclosure sale of said railway and property.

2. The Court of Appeals erred in failing and refusing to reverse the decree of the Circuit Court.

Wherefore the said C. H Bosworth, receiver of the Chicago, Peoria & St. Louis Railway Company, prays that the judgment and decree of the United States Circuit Court of Appeals for the Seventh Judicial Circuit, and of the United States Circuit Court for the Southern District of Illinois, be reversed, and this cause be remanded with directions to dismiss the intervening petition.

Bluford Wilson
Philip Barton Warren

Solicitors for C. H. BOSWORTH,
Receiver Chicago, Peoria & St. Louis Railway.

2042

Supreme Court of the United States

October Term, 1897

C. H. BOSWORTH, RECEIVER OF THE CHICAGO, PEORIA & ST. LOUIS RAILWAY,
Petitioner.

vs.

THE CARR, RYDER & ENGLER COMPANY,
Respondent.

BRIEF AND ARGUMENT IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

Statement.

Pursuant to an order duly entered in the United States Circuit Court for the Southern District of Illinois, in a cause therein pending wherein the Mercantile Trust Company, et al, were complainants and the Chicago, Peoria & St. Louis Railway Company, et al., were defendants, C. H. Bosworth was appointed receiver of all of the property of said defendant railway company, and immediately took possession thereunder, and from that time until the first day of February, 1896, he was in the possession and operation, as such receiver, of the railroad and property of said defendant railway company.

On the 21st day of February, 1895, the Carr, Ryder & Engler Company, by its solicitors, filed its intervening petition in the said cause of the Mercantile Trust Company against the Chicago, Peoria & St. Louis Railway Company; that in and by said intervening petition, it was alleged that the petitioner was a corporation existing under and by virtue of the laws of the State of Iowa, with its principal office at the city of Dubuque; that on the 20th day of October, 1894, the petitioner delivered at Dubuque, Iowa, to the Chicago, Milwaukee & St. Paul Railway Company, a quantity of manufactured doors, sash, blinds, etc., for the purpose of having the same transported by the said railway and connecting lines of railroad, from Dubuque, Iowa, to Birmingham, Alabama; that on the 24th day of October, 1894, the said doors, sash, blinds, etc., were loaded into a car of the Chicago, Rock Island and Pacific Railway Company, number 1004, and consigned to the May & Thomas Hardware Company, Birmingham, Alabama, by way of East St. Louis, Illinois; that said property was of the value of $777.28; that said car was transported by the said Chicago, Milwaukee & St. Paul Railway Company to Rock Island and delivered to the Rock Island & Peoria Railway Company, and by said last named company transported to Peoria, and there delivered to the Chicago, Peoria & St. Louis Railway Company, to be transported by it to East St. Louis,

and there to be delivered to the next connecting line of railroad, and so on to its destination; that said Chicago, Peoria & St. Louis Railway Company received said car and transported the same as far as East St. Louis, a station on its line of railroad, and while the same was still in transit and on its way to destination, and in the possession and under the control of said Chicago, Peoria & St. Louis Railway Company, the said car and property were destroyed by fire on the evening of the 28th day of October, 1894, and that the petitioner suffered damage to the amount of the value of said sash, doors, blinds, etc., namely, $777.28.

Said intervening petition further alleges the appointment of C. H. Bosworth as receiver of the Chicago, Peoria & St. Louis Railway, and that at the time he was operating said property, the liability of such railway company to the petitioner was incurred; and is of such a nature as entitles it to a priority over debts and demands secured by the mortgages

To this intervening petition, C. H. Bosworth, as receiver, filed his answer on the 11th day of March, 1895, in which he denied that at the time said car and contents were destroyed by fire, they were in his possession, custody or control; and further answering the said receiver alleged that after the said cars had been delivered to him, and before their destruction by fire, they were delivered to the Terminal Railroad Associa-

tion of St. Louis; that at the time of their destruction by fire, they were in the sole custody, care and control of said Terminal Railroad Association, under a certain agreement between the Chicago, Peoria & St. Louis Railway Company, and the said Terminal Railroad Association, by which the latter contracted to give to the former terminal facilities at East St. Louis and to handle and care for its freight, including the property mentioned; and further answering, alleged that the property mentioned in said intervening petition, was in the care of the said Terminal Association in the course of a regular interchange of business with that Association, in accordance with the custom that had been in force for the past four years, by which it became and was the duty of said Terminal Association to exercise due care and caution in the safe keeping and handling of said cars and freight, while in the custody and control of the same; and further alleging, that the Terminal Association wilfully and negligently, stored the said property in close proximity to a certain lot of bailed hay, which hay was fired by sparks from a certain passing switch engine belonging to the said Terminal Association, which fire was communicated to the property mentioned in said intervening petition; and further answering alleged, that in addition to the property described in said intervening petition, more than forty cars and their valuable contents were either wholly destroyed

or damaged; further answering, the receiver denied that the petitioner was entitled to the relief, or any part thereof, demanded.

On the 27th day of August, 1897, for the purpose of saving the labor and expense of making proof, it was stipulated by the parties that the said Carr, Ryder & Engler Company is a corporation, as alleged, having its place of business at the city of Dubuque, Iowa; that on the 20th day of October, 1894, it delivered to the Chicago, Milwaukee & St. Paul Railway Company, at Dubuque, the property mentioned in its petition, consigned to the May & Thomas Hardware Company, at Birmingham, Alabama, by way of East St. Louis, and was loaded in a car of the Rock Island & Pacific Railway Company, No. 1004, and was to be transported to destination, pursuant to the bill of lading issued therefor, which bill was attached to the stipulation; that while said property was in transit it was destroyed by fire at East St. Louis on the evening of the 28th day of October, 1894; that at the time it was destroyed the petitioner was the owner, and that the property was of the value of $777.28; and petitioner was damaged in that sum, and shall be entitled to recover that amount, if it shall be adjudged that it is entitled to recover in this proceeding.

After the facts were stipulated to as above set out, both parties proceeded to the taking of testimony as to the question of whether or not at the time the

loss occurred, the property was in the possession of your petitioner, as such receiver. On this point the evidence shows that, after your petitioner received said car at Pekin, Illinois, he hauled the same to a point immediately beyond the terminus of his own rails at East St. Louis, and placed said car on certain "Y" rails of the Terminal Railroad Association, reaching that point about 3 o'clock on the afternoon of October 28th, 1894; that the servants of the Terminal Railroad Association of St. Louis, in the usual course of employment by that company, then hauled the car to a certain customary halting place on the premises of their employer; using for the purpose an engine which belonged to their employer; here they left said car stationary, until the evening of that day, when it was destroyed by fire; and that in the usual course of business the Terminal Association, after obtaining from the receiver a way-bill or memorandum, indicating the ultimate destination of said car, would have hauled the same over its own rails in East St. Louis, or over rails subject to its control for that purpose, and delivered the same to a carrier on whose rails the transit south was to continue.

The evidence further showed that the Terminal Railroad Association in fact took, and at the time of the loss, had the actual physical custody and care of the property; that the haul over the tracks of the Terminal, from the point where the receiver's servants parted from

the car, to the point where the loss occurred, was a portion of the transit to be made in any case, no matter what the ultimate destination of the car might be; that for the purpose of moving the car thus far the information as to the ultimate destination, which a way-bill would have given was not needed; that no way-bill had up to that time been delivered, but that it does not appear that the lack of the information contained in such way-bill contributed in any way to the loss; that it further appeared that in the carrying business conducted by the Terminal Association the car in question would remain stationary for a time, and thereafter be hauled, probably with other cars, grouped for the purpose, to the starting place of the carrier who was to take it south; that information as to the ultimate destination and route had not as yet been actually imparted by the receiver to the Terminal Association, but that the latter was content for the time being, to treat such information, then in the possession of the receiver, as sufficiently available to itself.

On the 10th day of April, 1896, the Master in Chancery, to whom said intervening petition was referred, filed his report, in which he found that the said car and its contents were held by the receiver as a common carrier at the time of its loss; and that the intervener had a just claim against said receiver in the sum of $777.28.

On the the 27th day of April, 1896, the receiver filed his exceptions to the said master's report; that the same were overruled, and said report approved on the 3d day of March, 1897; that on the 5th day of April, 1897, a decree was entered by the United States Circuit Court for the Southern District of Illinois, affirming the said master's report and ordering said receiver to pay to intervening petitioner the said sum of $777.28 with interest.

On the 5th day of April, 1897, the receiver prayed for, obtained and perfected an appeal to the United States Circuit Court of Appeals for the Seventh Circuit from the said decree of the United States Circuit Court for the Southern District of Illinois, and duly assigned his errors on the record.

Said appeal came on for hearing in said Circuit Court of Appeals before their Honors, Judges Woods, Jenkins and Showalter, and was argued in said court, and subsequently, on the 25th day of February, 1898, the said Circuit Court of Appeals handed down its decision wherein and whereby the said decree of the United States Circuit Court for the Southern District of Ilinois was affirmed, his Honor, Judge Showalter, dissenting therefrom; a copy of which opinion is attached to the transcript of record certified to this court.

Thereafter, on or about the 25th day of March, 1898, the receiver filed his petition in said Circuit

Court of Appeals for a rehearing, which petition was subsequently on or about the 1st day of April, 1898, overruled, a copy of which petition is also attached to the transcript of record certified to this court.

A great number of intervening petitions were filed in the foreclosure cause pending in the United States Circuit Court for the Southern District of Illinois, for claims arising out of this same fire; that the Master in Chancery of the Circuit Court found him liable in each and every of the cases; that for the purpose of avoiding the expense of an appeal in each and every case, it was agreed between counsel that four different cases should be appealed, and stipulations were entered into that the other cases should abide the result of those cases thus appealed; that of the other cases appealed all three involved shipments of barley to grain brokers, for sale on the grain exchange in St. Louis; that in the trial it was shown that an agreement existed between these grain brokers and the Terminal Railroad Association, by which the latter was to hold such barley in store on its tracks in East St. Louis until the same could be sold; that by reason of this agreement, among other things, the Circuit Court of Appeals reversed the decree of the Circuit Court entered in the three other appeals; that all four of these appeals were submitted to and were considered by the Court of Appeals at one hearing and one opinion rendered to cover all; that in that opinion

the court of appeals declared that inasmuch as the agreement as to barley had no application to the Carr, Ryder & Engler case, the decree of the Circuit Court in favor of that company was right; the Court of Appeals was of the opinion that though in the physical possession of this particular car, (in the case at bar) the Terminal Association had not become responsible as a carrier therefor, because it had not been put in possession of a way-bill or other form of information on which it could proceed with the carrying.

Argument.

The questions presented by this application are: *First*, is this a proper case for the exercise of the power of this court in certiorari.

If this is determined in the affirmative, then, *Second*, did the Court of Appeals for the Seventh Circuit err in holding, notwithstanding the fact that pursuant to custom and agreement the appellant had deposited the car in controversy on the certain designated "Y" of the next connecting carrier, and that carrier had taken actual physical possession and control of the same, the appellant was still liable as a common carrier, for the same, for the simple reason that it had not forwarded to the connecting carrier a way bill showing the ultimate destination of the car.

I.

This is a proper case for the issuing of a Writ of Certiorari.

The act of Congress, approved March 3d, 1891, creating the Circuit Court of Appeals, expressly provided, by its Sixth section, for a review by the Supreme Court, in the following language:

> "And excepting, also, that in any such cause as hereinbefore made final in the Circuit Court of Appeals, it shall be competent for the Supreme Court to require, by certiorari or otherwise, any such case to be certified to the Supreme Court for its review and determination with the same power and authority in the case as if it had been carried by appeal or writ of error to the Supreme Court."

In the very late case of *Forsythe v. City of Hammond*, (decided April 9th, 1897), the Supreme Court, in response to a contention of lack of power to take cases by certiorari, said of this section of the Act that:

> "The general language of this clause is noticeable. It applies to every case in which, but for it, the decision of the Circuit Court of Appeals would be absolutely final, and authorizes the court to bring before it for review and determination the case so pending in the Circuit Court of Appeals, *and to exercise all the power and authority over it which this Court would have in any case brought to it by appeal or writ of error.* Unquestionably the generality of this provision was not a mere matter of accident. It expressed the thought of Congress distinctly and clearly, and was intended to vest in this court a comprehensive and unlimited power. * * * * All that is essential is that there be a case pending in the Circuit Court of Appeals, and of those classes of cases in which the decision of that

> court is declared a finality, and this court may, by virtue of this clause, reach out its writ of certiorari and transfer the case here for review and determination."

Fully appreciating the fact that "a power so broad and comprehensive, if carelessly exercised, might defeat the very thought and purpose of the act creating the Court of Appeals," we shall endeavor to show that the case at bar comes within the narrow limits early prescribed by the Supreme Court for the exercise of this power.

In *ex parte Lau Ow Bew, 141 U. S.. 583*, this court announced that one of the grounds upon which it would exercise this power was in cases in which the question involved was one of gravity and importance. And in *Forsythe vs. City of Hammond, supra*, it said:

> "That while this power is co-extensive with *all possible necessities* and sufficient to secure to this court *a final control over the litigation in all the Courts of Appeal*, it is a power which will be sparingly exercised, and only when the circumstances of the case satisfy us that the importance of the question involved, *the necessity of avoiding conflict between two or more Courts of Appeal*, or between Courts of Appeal and the courts of a State, or some matter affecting the interests of this nation in its internal or external relations, demands such exercise."

The circumstances which we contend to exist to warrant the exercise of this power are, (1), the importance of the questions involved, and (2), the conflict of the decision of the Circuit Court of Appeals for the Seventh Circuit and the decisions of this Honorable Court.

(a) The importance of the questions involved justifies a review by this court.

Two of the grounds upon which the Court of Appeals bases its decision in this case, involve the question (1) of delivery of freight between connecting carriers, and (2) whether a terminal or switching railroad shall be considered a common and connecting carrier.

The first of the above questions upon its face imports gravity and importance, since the commercial and shipping interests of this nation are large, and for their protection and guidance demand that the principles of law applicable thereto shall be as definitely as possible announced.

The second of the above questions becomes highly important when it is remembered that in and about all large cities, or centers of industry, there are terminal and switching railroads, which the interchange of traffic demand for the purpose of facilitating the transportation of freight in bulk between the common carriers which reach the proximity of said cities. Every day there are large numbers of cars which are being handled by such switching and terminal railroads, and therefore the question as to the character of the liability assumed by such terminal and switching railroads, when they are in the actual physical possession and control of such freight, becomes important for the guidance, not only of common carriers, but of the

whole commercial interests. This question has never been definitely and directly passed upon by this honorable court.

(b) The necessity for unanimity in the decisions of the Federal Courts also justifes a review by this Court.

In addition to the importance of the questions involved, we have here a conflict in the decisions of the Court of Appeals and this Honorable Court, which has been recognized as a most potent reason for a review by this court. *Forsythe vs. City of Hammond, supra.*

In the case at bar the Circuit Court of Appeals, after recognizing that the car in question was in the actual physical possession and control of the Terminal Railroad Association, having been placed on its rails, pursuant to a custom, and at a designated place, and the said Terminal Railroad Association had hauled it to a customary halting place on its own rails, then held that by reason of the appellant not having forwarded the way-bill, which contained informatian as to the ultimate destination of the car, the appellant had not made such a delivery as was sufficient to divest him of his common law liability.

This is in direct conflict with the decision of this Honorable Court in *Pratt vs. Grand Trunk Ry. Co., 95 U. S., 43*, where it is held that if by custom or agreement there is a designated place of deposit between

two connecting carriers, delivery is made by such deposit, although shipping directions had not as yet been given from the first to the second carrier.

II.

Delivery pursuant to custom or agreement is sufficient.

If this court is of the opinion that this case is a proper one for review, the question which then presents itself is, can delivery to a connecting carrier be made only by communicating complete and ultimate shipping directions to the succeeding carrier, or is a sufficient delivery made when the connecting carrier takes actual physical possession for the purpose of hauling the car a certain distance on its rails, and there, pursuant to long establised custom, to await the coming of the information as to the ultimate destination?

It is not necessary to antagonize the general rule that a railroad cannot divest itself of a carrier's liability by delivering to the next connecting carrier, unless such delivery is accompanied with the necessary shipping directions for the further transportation of the goods, to sustain the exceptions to it which have their foundation in custom and agreement.

(a) **At common law a carrier is not bound to carry beyond his own rails.**

By a reference to the bill of lading in this case (R. p. 44) it will be seen that there was no express contract of carriage between the shipper and this receiver, and therefore the only contract in existence is that which is implied in the common law by his acceptance of the goods for carriage. That such a contract is one simply to safely carry and deliver to the next succeeding carrier. hardly needs the citation of authorities to sustain. His duty is fulfilled when he has done that, and so in the very beginning we see that he was under no obligation to carry this car beyond his own rails.

Michigan Cent. vs. Mineral Springs, 16 Wall 324;
Atchinson Ry. vs. Denver Ry., 110 U. S. 667;

There is no question in this record but that this car had been hauled the entire length of the receiver's rails, which terminated at Bridge Junction and deposited it on the rails of the Terminal Association; but it is contended that, inasmuch as the receiver had no terminal facilities at East St. Louis, a point beyond his line. that the receiver was bound to provide such facilities, and having entered into a written agreement with the Terminal Association by which the latter was to handle and care for freight coming from the receiver's road and going through or to that place, such agreement made the rails of the Terminal the

receiver's rails. The construction of this agreement we will discuss later; we simply desire now to assert the proposition that the receiver was under no obligation, by express or implied contract, to furnish to this shipper on account of this shipment such facilities beyond his own rails in East St. Louis.

(b) This shipment was set to a designated place of deposit.

Independent of the written agreement referred to, the record shows that the car in question was hauled by the receiver to a point on a certain "Y" belonging to the Terminal, where according to the custom existing between the two carriers, the latter sent its own servants with its own engine and took physical possession of the same, (R. p. 214, 219, 231.) In addition to this it was the custom of the Terminal to immediately take a record of all such cars deposited on this "Y," (R. p. 75, 83, 98) as having been delivered to it on the day of their arrival, and not to wait until it received a way-bill before making a record of such delivery. (R. p. 114.)

When it is considered that the contract under which the receiver was acting in no way obligated him to carry this shipment beyond his own rails, and the record shows that he carried it to the end of his rails and deposited it at a certain place, designated by custom, on the rails of the connecting carrier, which took *actual physical possession* of it, we submit that a

prima facie case of delivery has been made, notwithstanding no ultimate shipping directions had been forwarded.

In support of this we rely on the law, as laid down by this Honorable Court in the case of *Pratt vs. Grand Trunk Railway, 95 U. S., 43.* There the goods had been shipped from Liverpool to St. Louis in packages marked "P. & F. St. Louis." They were carried by the Grand Trunk Railway to Detroit, where they were destroyed by fire, under circumstances almost identical with the facts in the case at bar, a delivery was held to have been made to the connecting carrier. In the opinion of the court it is said:

> "At the time the fire occurred the defendant had no freight room or depot at Detroit, except a single apartment in the freight depot of the Michigan Central Railroad Company. Said depot was a building several hundred feet in length, and some three or four hundred feet in width, and was all under one roof. It was divided into sections or apartments, without any partition wall between them. There was a railway track in the center of the building, upon which cars were run into the building to be loaded with freight. The only use which defendant had of said section was for the deposit of all goods and property which came over its road, or was delivered for shipment over it. This section, in common with the rest of the building, was under the control and supervision of the Michigan Central Railroad Company, as hereinafter mentioned. The defendant employed in this section two men, who checked freight which came into it. All freight which came into the section was handled exclusively by the employees of the Michigan Central Railroad Company, for which, as well as for the use of said section, said defendant paid said company a fixed compensation per hundred weight. Goods which came into the section from defendant's road, destined over the road of the Michigan Central Railroad Company, were, at

the time of unloading from defendant's cars, deposited by said employees of the Michigan Central Railroad Company in a certain place in said section, from which they were loaded into the cars of said latter company by said employees when they were ready to receive them; and, after they were so placed, the defendant's employees did not further handle said goods. Whenever the agent of the Michigan Central Railroad Company would see any goods deposited in the section of said freight building set apart for the use of the defendant, destined over the line of said Central Railroad, he would call upon the agent of the defendant in said freight building, and, from a way bill exhibited to him by said agent, he would take a list of said goods, *and would then, also, for the first time learn their ultimate place of destination*, together with the amount of freight charges due thereon; that from the information thus obtained from said way bill in the hands of the defendant's agent, a way bill would be made out by the Michigan Central Railroad Company for the transportation of said goods over its line of railway, and not before.

These goods were, on the 17th of October, 1865, taken from the cars and deposited in the apartment of said building used as aforesaid by the defendant, in the place assigned as aforesaid for goods so destined.

At the time the goods in question were forwarded from Montreal, in accordance with the usage in such cases, a way bill was then made out in duplicate, on which was entered a list of said goods, the names of the consignees, the place to which the goods were consigned, and the amount of charges against them from Liverpool to Detroit. One of these way bills was given to the conductor who had charge of the train containing the goods, and the other was forwarded to the agent of the defendant in Detroit. On arrival of the goods at Detroit the conductor delivered his copy of said way bill to the checking clerk of defendant in said section, from which said clerk checked said goods from the cars into said section. It was the practice of the Michigan Central Railroad Company, before forwarding such goods, to take from said way bill in the custody of said checking clerk, in the manner aforesaid, the place of destination and a list of said goods and the amount of accumulated charges, and to collect the same, together with its own charges, of the connecting carrier."

In commenting on this case, and in applying the rule of law there laid down to the facts in the case at bar, his Honor. Judge Showalter, in his dissenting opinion, filed in the Court of Appeals, (R. p. 402) says:

> "It will be seen from the foregoing statement that on the course of dealing between the two carriers, *shipping directions had not been received by the connecting carrier.* The court mentions the mark on the goods, but not as a controlling factor in the decision. The Michigan Central Railroad Company did not look at the marks on the goods for the shipping directions upon which it acted. Under the mode of dealing between the two carriers, the case was the same as though they had been no marks on the packages. The goods were on the platform of the connecting carrier at the time of the loss. The defendant did not own or have any possessory right over that portion of the connecting carrier's station-house. Defendant's servants were not privileged either to unload the goods there or to handle the goods afterwards. The servants of the connecting carrier placed all goods which were to be forwarded as designated by the agent of the defendant at a particular locality on the platform in question. The defendant ceased to be and the connecting carrier became the bailee of the goods—*and this before the shipping directions had been given by the one carrier to the other according to the understood mode of dealing between them.* This was a case in which the defendant did not own or possess the unloading platform. If the defendant had owned or possessed that section of the station where the goods were unloaded, the mere placing of the goods in controversy at a particular locality on the platform, from which the servants of the connecting carrier would afterward, without special license from the defendant, take them, would not have changed the custody of such goods. The law upon this point is clear. Nor would the connecting carrier have become bailee even if its agent had received the shipping directions before the destruction of the goods. The fact that the goods were still in the custody of the defendant would from the standpoint of the shipper, have determined the matter. I may add that the Grand Trunk Railway Company had no terminal, that is to say, unloading facilities at Detroit,

so far as concerned the owner of the goods in question. The section of the station in which the freight of the Grand Trunk Railway Company was unloaded was owned and possessed by the connecting carrier. In the case at bar the connecting carrier not only took exclusive possession of the cars in controversy at the terminus of appellant's rails, but hauled them to a point on its own rails to which appellant had, neither in law nor by contract, even a right of access."

III.

Issuing of way-bill by the Receiver to the Terminal Association was not necessary to constitute delivery.

It was contended in the court below, that notwithstanding the *actual physical* delivery to the Terminal Railroad Association, yet the receiver was responsible for the cars and contents up to the time he issued a new way bill for them, and passed that way-bill on to the Terminal Association: Our reply is, that:

(a) Such way-bill is simply evidence of delivery, which may be shown by other competent evidence.

Therefore we insist that it is wholly immaterial and technical to object that, prior to the fire, no way-bill covering the ultimate destination had been passed over to the Terminal Company. At most, such way-bill or bill of lading is simply *evidence* of a delivery

and does not in itself constitute the delivery, and if actual and physical delivery has been made, *it can be established by other evidence.*

For a court of equity to sustain the contrary contention, it will be compelled to ignore the actual physical delivery and require a technical one. Even courts of law have not done this.

In the case of *Illinois Central vs. Smyser, 38 Ill., supra*, where goods had been placed in a car of the Railroad Company, with its assent, for the purpose of shipment, the loaded car being under the exclusive control of the company, the court held that the goods thereby passed into the possession of the company as effectually as if they had been delivered in its warehouse. In the opinion of the court it is said:

> "*The said track and cars belonged to the company and are under their exclusive control*, and there is no question that the company placed this car at a point opposite the wharf boat on which the cotton was stored, for the express purpose of having it transferred from the boat to the car, that they might transport it to the point desired by the shipper. *The company had the exclusive use and control of their road, said tracks, and their cars;* no use could be made of them without the consent of the company. They had the right to permit their cars to stand at the point at which this one was placed. The company at any moment, at least after the car was loaded, had the unquestioned right to remove it to any other part of their road, but the commission merchant had no such right, even if he had possessed the means. He simply had the right to load the cotton on the car."

Applying the evidence in that case to the facts in the case at bar, the court must be struck by their

mutual similarity. There is no question but what the tracks upon which these cars stood, at the time of the loss and damage, belonged to the Terminal Railroad Association and were under its exclusive control. Concede, if you please, that these cars were being handled under the contract referred to between the Terminal Railroad Association and the old Chicago, Peoria & St. Louis Railway Company in the evidence; that contract contained no provision by which the Terminal Railroad Association gave up any right to its exclusive control over these tracks. On the contrary, the Terminal Railroad Association always sent its own engines up to the "Y" tracks, and hauled the cars down to their yards, not even permitting the engines of the railway company to come upon its tracks.

It was also attempted in the evidence to show that the Terminal under this contract set apart certain tracks for the use of the Chicago, Peoria & St Louis Railway Company, but this wholly failed, inasmuch as it was established by a preponderance of the evidence that the Terminal Railroad Association used the tracks indiscriminately for other customers, and even went so far as to rent out and convert a warehouse, which was situated in their midst, into a veritable fire trap. (R. p. 199-202-212-213).

Again, using the same language of the Court in the *Smyser case, supra:*

> "They (the Terminal Railroad Association) had the right to permit their cars to stand at the point at which

> this was placed. The company (the Terminal Railroad Association) at any moment, at least after the car was loaded—(these cars were loaded) had the unquestioned right to remove it to any other part of their road, (yard) but the commission merchant (the receiver) had no such right, even if he had possessed the means. He simply had the right to load the cotton in the car.

The receiver simply had the right to deposit the cars at the terminus of his road in such a way as to permit the Terminal Railroad Association to atttach its engines thereto.

Continuing, the court in the *Smyser case, supra*, says:

> "The wharf boat, on the contrary, with its contents, was in the possession of the commission men, and the cotton so continued until it was placed in the cars. It then passed into the possession of the company as undoubtedly as if it had been delivered in their warehouse, no doubt for the mutual convenience of all parties. And this, too, with the assent of the company, to promote their interest in the transaction of the business for which it was created."

Now as to the assent of the Terminal Railroad Association, we admit the same is necessary to complete a delivery. On that point can it be contended for a moment that its assent is not to be presumed from the fact that it sent its engines up to the "Y" tracks, broke up the receiver's train, attached to the cars and hauled them down into their own yards and on their own tracks, and there deposited them. Can it be contended that the Terminal Railroad Association's assent is not to be presumed or implied from

the fact that it attached its engines to the cars, and by its own servants hauled them to a certain point on its own rails.

And so the court in the *Smyser case*, says:

> "No difference is perceived in receiving freight on the platform of their depot and into their cars at any place on their road or side track; or whether it is placed there by their own employes or by other persons, *so it is done with the assent of the company.*"

Now in that case the same contention was made as to a bill of lading not having been made out, as in the case at bar a way-bill for these cars had not been delivered to the Terminal Railroad Association. On that point, the court said:

> "*It is not the simple signing of a bill of lading which transfers the possession of freight to the company*, but it is evidence that they have received possession. *Their possession may be shown by any other legitimate evidence.* The bill of lading of a common carrier is fixed by accepting the property to be transported. If, however, goods are placed on his boat or car, without his knowledge, *or that of his agent*, he is not liable. *Angel on the Law of Carriers, Sec. 140*, says: 'When the person having the custody of the goods to be shipped never parts with their possession or places them under the control of the carrier, there is no bailment, and consequently no liability incurred.' *Ibid.* But in this case the company by their acts accepted the trust. The cotton was not placed in the car without their knowledge, but it was with their express assent. Had the employees of Williamson, Haynes & Company placed the cotton on the platform of the depot without the assent of the company to be transported, no one would doubt their liability; and yet in principle no difference is perceived."

We, therefore, insist that by the act of the Terminal Railroad Association attaching its engines to the

cars and depositing them on their own tracks, it knew the car was in transit, and according to the established custom, hauled the car to a certain point on its own rails, and was there content to hold it until the way-bill came in the usual course of business.

To show how utterly immaterial this act of delivering a way-bill or sending a junction report is to the actual delivery of the cars, let us place the "shoe on the other foot," and ask the question: "If there had been a new way-bill issued but no actual physical delivery of the cars, would this court hold the party to whom the way-bill had been issued responsible for the care, custody and control of the cars?" The answer to this is found in *Missouri Pacific vs. McFadden, 154 U. S., 155*, where the court said:

> "All of these allegations in the answer were, of course, admitted by the exception, and, therefore the case presents the simple question of whether the carrier is liable on a bill of lading for property which, at the time of signing of the bill, remained in the hands of the shipper for the purpose of being compressed for the shipper's account, and was destroyed by fire before the delivery to the carrier had been consummated. The elementary rule is that the liability of a common carrier depends upon the delivery to him of the goods which he is to carry.

Continuing further the court, quoting from *King vs. The Lady Franklin, 8 Wall, 325*, speaking of a bill of lading says:

> It is an instrument of a two-fold character. It is at once a receipt and a contract. In the former character it is an acknowledgment of the receipt of property

> on board his vessel by the owner of the vessel. In the latter it is a contract to carry safely and deliver. *The receipt of the goods* lies the foundation of the contract to carry and deliver. If no goods are *actually* received, there can be no valid contract to carry and deliver."

And continuing, the court thus characterizes that rule:

> "The rule thus stated is the elementary commercial rule. Indeed, in the case last cited this court expressed surprise that the question should be raised. This view coincides with the rulings of the English Courts."

IV.

The Agreement with the Terminal Association was not a Lease by which the Receiver's Rails were extended into East St. Louis.

Opposing counsel sought to meet the prima facie case of delivery thus made by the receiver, by construing the agreement which existed between the Terminal and the receiver as a lease of the rails of the former to the latter, and upon this base their argument that the car, at the time of its destruction, was still in the possession of the receiver.

We desire to recur to the fact that the rails of the receiver terminated at a station called Bridge Junction, and did not extend south of the road marked "Stockyards Avenue" on the plat opposite page 112, in the record. Opposing counsel have assumed from

the statement in the first clause of this agreement that the Terminal Association "undertakes to give the party of the second part terminal facilities at East St. Louis," that the receiver had no terminal facilities at the terminus of his line. This assumption is unwarranted by the facts. In connection with this shipment it was not considered necessary to show that the receiver had terminal facilities at the end of his line, since this shipment was a through shipment, and not expected to be handled in the receiver's yards at the terminus of his rails, but from the first was intended to be "set to" the tracks of the Terminal Association, as the next connecting carrier. Therefore no direct evidence of terminal facilities were introduced. However, by a reference to the "plat of railway yards" in this record (R. p. 112) it will be seen at the bottom of the plat, and toward the middle, the beginning of yards marked "J. S. E. freight yards."

"J S. E." was the common name by which the railroad operated by the receiver had theretofore been known. (R. p. 21.) This identity is also shown by the fact that the line of railroad belonging to the C., P. & St. L, Railway is designated on this plat as the "Jacksonville Southeastern R R." These "J. S. E. freight yards" are referred to and identified by the testimony of the receiver himself. (R. p. 231) and opposing counsel tried hard to get him to say that he had no terminal facilities but did not succeed. Therefore,

this agreement was not entered into for the purpose of supplying any deficiency in the line of railroad which the receiver was operating for the purpose of complying with his common law obligations as a carrier.

The agreement was simply for the purpose of securing a certain and definite rate to be paid to the Terminal Association for switching through cars to and from the rails of the receiver and other companies in the vicinity of East St Louis, and to provide beforehand for the ample and quick handling of such through freight, so that the receiver's own terminal facilities would not become clogged or over-taxed by the accumulation there of such through freight in addition to that which was purely local and destined only to East St. Louis.

In this connection it is well to consider the nature of the railroad of the Terminal Association, and the character of the business that it solicited and carried on. By a glance at the plat (R. p. 112) it will be seen that the rails of the Terminal connect with all of the many railroads centering in East St. Louis; this taken with the name of the Association points directly to the fact that it is a switching railroad, which serves all other railroads centering in East St. Louis by delivering cars from one to the other.

As a matter of fact, it could have been shown that the Terminal Railroad Association has the same sort of an agreement with every other railroad entering East St. Louis, as it has with the receiver.

Unless, therefore, it can be said that the mere fact of the Terminal Association being a switching railroad, whose main business is simply the switching of cars from one railroad to another, prevents it from assuming the character and liability of a connecting carrier for the cars while they are in its possession in the course of such transportation from one railroad to another, then we submit that the existence of such an agreement, as that of August 1, 1892, does not in itself change the relations between the Terminal Association and other railroads, from which it receives cars.

In *Missouri Pacific R. R. vs. Grocery Co.*, 55 Kan. 525, we find a logical statement of the reason why the mere fact that a railroad is a switching railroad does not relieve it of the liability of a connecting carrier. In that case a car load sugar sent from Louisiana was consigned to the plaintiff, a grocery company at Wichita. It was shipped over the Texas & Pacific Company's line, and was brought to Wichita by the St. Louis & San Francisco Company. It was there place on the "Y" and switched by the defendant company over its tracks to the spur track in the rear of the plaintiff's warehouse, for which service the St. Louis & San Francisco Company paid their regular switching charge of two dollars per car. The court held that the defendant was liable as a common carrier for a loss

occurring after it had taken charge of the shipment, and before the plaintiff had had reasonable time in which to remove it, among other things saying:

> "A railroad transporting a passenger or a car load of freight one mile, using a switch engine for motive power, is just as much a common carrier as if the distance were a thousand miles by regular freight or passenger train. The fact that compensation for this particular service was paid by the St. Louis & San Francisco Railroad Company, while it might render that company also responsible, it could not relieve the defendant company from its liability as a carrier."

To sustain the contention that the agreement of August 1, 1892, excluded the relation of connecting carriers between the two companies, or that the contract itself made them respectively principal and agent as to the interchange of all traffic between them, it is absolutely necessary to ignore the fourth provision of the contract which is: (R. p. 111.)

> "Fourth. All cars consigned to and from the East St. Louis freight house of the party of the second part, to be switched to and from the Wiggins Transfer tracks without extra charge. Regular switching charges and rules to apply to all other cars to and from connections, the party of the first part to be governed in making its collections by instructions shown on bill to it, as to who should pay. In the absence of any instructions the switching charges will follow the car."

This clause expressly recognizes and provides for that interchange of traffic which occurs between connecting carriers, and contemplates the existence of that relation in just such a case as the one at bar. By that clause provision is made that the regular

switching charges and r
cars, to and from conne
switching charges shall
one in question, which
the tracks of the Termi
of other railroads conne

rules shall apply on all other
ections; that is, that the regular
l apply to such a car as the
necessarily had to pass over
inal Association to the tracks
ecting with the latter.

According to the c
the two companies, such
were placed upon the de
Association, and when t
thus placed, it knew tha
over its rails to the rail
for that purpose it took
employes and attached
hauled them to a point
convenient for it to hol
mate shipping direction
tion, so that it would kn

custom which existed between
h cars as the one in question,
esignated "Y" of the Terminal
the latter company found cars
at they were to be transported
ls of some other railroad, and
possession of them by its own
l its own engine to them and
on its own rails, where it was
d them until it received the ulti-
s, namely, the ultimate destina-
ow to which railroad to set it.

Now it is to be rem
not provide that *certain*
territory in the yards o
to be set aside for the
in the sense that he was
or have any possessory

nembered that this contract does
yards or *any special* place or
f the Terminal Association are
e *exclusive* use of the receiver,
s to exercise any dominion over
right therein. Nor does the evi-
dence in fact show that
yards were set aside f

any particular portion of the
for the *exclusive* use of the re-
ceiver.

John Weidmer, of the Gratiot Street Warehouse Company, testified that he rented of the Terminal Association a warehouse which was right in the middle of that part of the Terminal's yards, which opposing counsel refer to as the appellant's "portion" of these yards; that some of the tracks ran through the warehouse; and that he rented from the Terminal on the understanding that it had full control. (R. pp. 212, 213.)

The servants of the Terminal Association may have been accustomed to haul cars from the receiver's road to some special territory in the yards of the Terminal, and that territory may for the time being have been "the yards set aside for the use" of the receiver, within the sense of the second section of the contract, *but such servants did not do this by any direction from the receiver;* nor was any right in him to direct or control them, or to designate the place on the grounds, or rails of the Terminal Association where any car received from his road should be at any given time in any way recognized. (R. p. 197-201) *This was the construction given to the contract and acted on by the parties.*

The agreement will be searched in vain for words of conveyance. There can not be found in it any transfer of any estate in the grounds or tracks, or any part thereof, or of any possessory interest in its engines, or control over its servants, from the Terminal Association to the receiver.

The conduct of the Terminal Association at the very fire which caused this great loss emphasizes the absence of any attempt on the part of the Terminal to make any such transfer by this agreement. As soon as the fire broke out, the receiver had an engine close by on his own rails, and his employees attempted to go in and hitch on to these cars and pull them away from the burning warehouse, but were prevented from so doing by the employees of the Terminal (R. p. 193). The evidence further shows that while a great many of the cars which came off of the receiver's road were set on to certain tracks by the Terminal Association, yet it further shows that this was not always the case, and that the Terminal would take the cars to any part of its vast yards which was most convenient to it, and there mingle them with cars from other railroads, and that after the Terminal had taken possession of such cars on the designated "Y," the receiver could in no manner direct the point to which they were to be transported on the rails of the Terminal. (R. p. 197-201). In other words, the evidence conclusively shows that the receiver had no use, direction or control over any portion of the Terminal yards.

Therefore we earnestly submit that the contract in question is nothing more than the result of precautionary measures on the part of the receiver for the prompt and adequate handling of *through* freight by

his connecting carrier, the Terminal, and *beyond this* is nothing more than a *division of the freight charge between the two connecting carriers.* As his honor, Judge Showalter, in his dissenting opinion filed in the Court of Appeals, said (R. p. 397):

> "As said above the shipper pays no more than if the appellant had himself owned and operated the lines of the Terminal Association. Such a contract could not interfere with or modify the legal obligation of either carrier to a shipper whose goods are handled successively by both. Neither appellant nor the Terminal Association could evade or alter any legal obligation to a third party by any contract between themselves. If the Terminal Association had alienated to appellant an actual ownership or possessory right over that portion of its tracks where the cars in controversy were destroyed, and such a control over its employees and engines, that said employees when engaged in handling the cars in question were the servants of appellant, and the engine used by them, his engine, for the time being, the case would be different. On this hypothesis, the tracks where the cars were destroyed would have been appellant's track's, the employees who hauled the cars to that point his servants, the engine used by them his engine, he would have continued to be the bailee of the property, and the matter of way bills or junction reports would have signified nothing. But in my judgment, as said, *the contract in question had no force as of alienation* by the Terminal Association to appellant of any possessory right, interest or estate in or over any property of the former company, or of any control over its servants. Neither the relation of lessor and lessee, nor that of licenser or licensee existed between these parties as resulting from said contract so far as it concerned the cars and contents in question."

V.

The Agreement between the Receiver and the Terminal did not make them principal and agent.

It was also argued in the courts below that the agreement of August 1, 1892, between the Terminal Railroad Association and the Chicago, Peoria & St Louis Railway Company made the former the agent of the latter. In the opinion of his honor, Judge Jenkins, it will be seen that he also is inclined to this view.

From an inspection of this agreement (R. p. 111) it will be found that the Terminal Railroad Association only agreed to furnish necessary yard room and track facilities in their yards at East St. Louis for the purpose of handling such freight which might originate on the line of the Chicago. Peoria & St. Louis Railway Company, or be received by that railway company from other lines to be carried to St. Louis or points beyond St. Louis over the rails of the Terminal Association. For this service the Terminal was to receive the customary charges for the handling of each car, just as any other connecting carrier would receive.

A case which is analogous to the one at bar is *St. Louis Insurance Company vs. St. Louis, Vandalia, Terre Haute & Indianapolis R. R. Co., 104 U. S., 146.*

There this court held that an arrangement between a Dispatch Company and sundry railroad companies, whose lines terminated at New York, whereby the latter, separately, agreed to carry all goods for the transportation of which the former should contract, at the established tariff rates, did not involve a joint liability on the part of the railroad companies, nor make the Dispatch Company the agent of the railroad companies, the court sayimg:

> "The Dispatch Company and the defendant had, it is true, certain business relations, but those relations did not necessarily involve an agency upon the part of the former for the latter, in the making of contracts for transportation. The agreement between those companies only bound the railroad company to 'receive, load and unload, deliver and way-bill' such freight as was sent to it by the Dispatch Company, and at the rates established; not by the latter, but by the defendant and other railroad companies."

So we submit, in the case at bar, that the agreement beetween the receiver and the Terminal Railroad Association only bound the latter to properly take care of and handle all freight which the former might deliver to it on the designated "Y," and at the rates established, not by the receiver, but by the Terminal.

It might as well be argued that every railroad company which enters into an agreement with a coal company to furnish it so many cars a day and to haul those cars at a certain price, thereby becomes the agent of the coal company, or thereby leases to it the cars and that portion of the rails necessary to make the haul contemplated.

VI.

The Terminal Association had received shipping directions.

In view of the custom which existed between the two companies by which the Terminal Association was to take possession of a car which the receiver placed on its rails, we submit that the depositing that car on the designated place is tantamount to a shipping direction.

The Terminal Association voluntarily accepted such cars from the receiver knowing them to be, at the time of such acceptance, in transit. The mere fact of the cars being at the designated place, had always been accepted by the Terminal as notice to it that such cars were in transit, and were to be hauled over its rails, either to some other railroad or into the city of St. Louis. With this knowledge and notice, the Terminal Association was accustomed to haul these cars to a certain point on its rails and there await further information from the receiver as to the ultimate shipping direction. The Terminal knew when it took possession of them, that they were *never* to be handled by the receiver again under the bill of lading or way-bill which accompanied them.

Ultimate shipping directions as between these two companies were regulated by an understood course of

dealing between them. Such a car, for instance, as the one in question, should in any case and by reason of the peculiar character of the carrying business conducted by the Terminal Association, remain for a time stationary at some point on its rails most convenient to it A certain portion of the transit could be traversed by the Terminal whether the ultimate shipping directions were contemporaneous with the delivery or came some hours later. As to this car, following the custom, the receiver had not at the time sent such ultimate directions, but they would have come in due course had the car not been destroyed, and would have been within ample time to suit the convenience of the Terminal Association in moving this car on to the rails of the next connecting carrier.

A state of facts very similar to this was attempted to be proven in the case of *Mt. Vernon Co. vs. Alabama R. R., 92 Ala., 296.* The car in question was brought to the place of junction between the connecting carriers, which was a station called Attala, and and there placed by defendants servants on a sidetrack belonging to the connecting carrier, which the latter was expected to move along towards the place of ultimate destination. No notice of this was given to the connecting carrier, and the car was destroyed on the side track. There the defendant undertook to prove that, by a course of dealing between itself and the connecting carrier, the latter was accustomed to re-

ceive on said side track and haul over its rails to the Chattanooga Compress, cars laden with cotton, and there await the way-bill or ultimate shipping direction. In this matter of proof, however, it was unsuccessful. But the court was evidently of opinion that if the car in question had been so taken and hauled to the Chattanooga Compress, it would have been delivered, suggesting that such a course of dealing would have been tantamount to a shipping direction to the connecting carrier to haul the car, as far, at least, as the Chattanooga Compress.

So in the case at bar, the Terminal Association knew, when it found this car in question on this "Y," and took possession of it, that it was to be hauled over its own rails, in any case as far as to the place of loss. For that much of the transit over its own rails, the Terminal Association needed no further shipping directions.

We therefore submit that, under these circumstances, all the regulations prescribed by the the custom were complied with by the receiver, and the delivery to the terminal was sufficient to charge it with the liability of a connecting carrier.

VII.

The carrier which had possession of the freight at the time of the fire is liable.

As we have heretofore said, the contract under which the receiver undertood to carry these goods was implied from his act of receiving the same for transportation, and that therefore under the common law rule it is only necessary for him to carry them to the end of his own rails and deliver them to the next connecting carrier, since the implied obligation of a carrier to the public is limited by the termini of his own route.

P. C. & St. L. Ry. vs. Morlon, 61 Ind., 539;
Ogdensburg vs. Pratt, 22 Wall., 129;
Mich. Cent. vs. Mineral Springs, 16 Wall., 324;
St. Louis Ins. Co. vs. St. Louis R. R. Co., 104 U. S., 685.

If, however, it can be said that the carriage by the receiver was pursuant to an express contract, that contract is to be found on the bill of lading (R. p. 44) which among other things contains this stipulation:

> "* * * It is further especially agreed that for all loss and damage occurring in the transit of such packages, the legal remedy shall be against the particular carrier or forwarder only, in whose custody the said packages may *actually* be at the time of the happening thereof,

it being understood that the said Chicago, Milwaukee & St. Paul Railway Company assumes no other responsibility for their safe carriage or safety than may be in incurred on it own road."

Therefore it is to be seen that either by the implied contract of carriage, or the express contract of carriage, the shipper must look to the carrier in whose custody the freight was *actually* at the time of its loss, and this carrier, we submit under the evidence in this case, and as a matter of fact, was the Terminal Railroad Association of St. Louis.

Conclusion.

In conclusion we respectfully urge that this court will grant a writ of certiorari in this matter, and will take and review the decision of the Circuit Court of Appeals in this case, reversing the same with directions to dismiss the intervening petition of the Carr, Ryder & Engler Company.

Respectfully submitted,

Bluford Wilson

Phelps Barton Wilson

Solicitors for C. H. Bosworth, Receiver Chicago, Peoria & St. Louis Railway.

Supreme Court of the United States

October Term, 1898

C. H. BOSWORTH, RECEIVER OF THE CHICAGO, PEORIA & ST. LOUIS RAILWAY,
Petitioner.

vs.

THE CARR, RYDER & ENGLER COMPANY,
Respondent.

BRIEF AND ARGUMENT FOR PETITIONER.

STATEMENT.

Pursuant to an order duly entered in the United States Circuit Court for the Southern District of Illinois, in a cause therein pending, wherein the Mercantile Trust Company, et al., were complainants and the Chicago, Peoria & St. Louis Railway Company, et al., were defendants, C. H. Bosworth was appointed receiver of all the property of said defendant railway company, and immediately took possession thereunder, and from that time until the first day of February, 1896, he was in the possession and operation, as such receiver of the railroad and property of said defendant railway company.

On the 21st day of February, 1895, the Carr, Ryder & Engler Company, by its solicitors, filed its intervening petition in the said cause. In and by said intervening petition, it was alleged that the petitioner was a corporation existing under and by virtue of the laws of the State of Iowa, with its principal office at the City of Dubuque; that on the 20th day of October, 1894, the petitioner delivered at Dubuque, Iowa, to the Chicago, Milwaukee & St. Paul Railway Company, a quantity of manufactured doors, sash, blinds, etc., for the purpose of having the same transported by the said railway and connecting lines of railroad, from Dubuque, Iowa, to Birmingham, Alabama; that on the 24th day of October, 1894, the said doors, sash, blinds, etc., were loaded into a car of the Chicago, Rock Island and Pacific Railway Company, number 1004, and consigned to the May & Thomas Hardware Company, Birmingham, Alabama, by way of East St. Louis, Illinois; that said property was of the value of $777.28; that said car was transported by the said Chicago, Milwaukee & St. Paul Railway Company to Rock Island and delivered to the Rock Island & Peoria Railway Company, and by said last named company transported to Peoria, and there delivered to the Chicago, Peoria & St. Louis Railway Company, to be transported by it to East St. Louis, and there to be delivered to the next connecting line of railroad, and so on to its destination; that said Chicago, Peoria & St. Louis Railway Company received said car and trans-

ported the same as far as East St. Louis, a station on its line of railroad, and while the same was still in transit and on its way to destination, and in the possession and under the control of said Chicago, Peoria & St. Louis Railway Company, the said car and property were destroyed by fire on the evening of the 28th day of October, 1894, and that the petitioner suffered damage to the amount of the value of said sash, doors, blinds, etc., namely, $777.28.

Said intervening petition further alleges the appointment of C. H. Bosworth as receiver of the Chicago, Peoria & St. Louis Railway, and that at the time he was operating said property, the liability of such railway company to the petitioner was incurred; and is of such a nature as entitles it to a priority over debts and demands secured by the mortgages.

To this intervening petition, C. H. Bosworth, as receiver, filed his answer on the 11th day of March, 1895, in which he denied that at the time said car and contents were destroyed by fire, they were in his possession, custody or control: and further answering the said receiver alleged that after the said cars had been delivered to him, and before their destruction by fire, they were delivered to the Terminal Railroad Association of St. Louis; that at the time of their destruction by fire, they were in the sole custody, care and control of said Terminal Railroad Association, under a certain agreement between the Chicago, Peoria & St.

Louis Railway Company, and the said Terminal Railroad Association, by which the latter contracted to give to the former terminal facilities at East St. Louis and to handle and care for its freight, including the property mentioned; and further answering, alleged that the property mentioned in said intervening petition, was in the care of the said Terminal Association in the course of a regular interchange of business with that Association, in accordance with the custom that had been in force for the past four years, by which it became and was the duty of said Terminal Association to exercise due care and caution in the safe keeping and handling of said cars and freight, while in the custody and control of the same; and further alleging, that the Terminal Association wilfully and negligently stored the said property in close proximity to a certain lot of bailed hay, which hay was fired by sparks from a certain passing switch engine belonging to the said Terminal Association, which fire was communicated to the property mentioned in said intervening petition; and further answering alleged, that in addition to the property described in said intervening petition, more than forty cars and their valuable contents were either wholly destroyed or damaged; further answering, the receiver denied that the petitioner was entitled to the relief, or any part thereof, demanded.

On the 27th day of August, 1895, for the purpose of saving the labor and expense of making proof, it

was stipulated by the parties that the said Carr, Ryder & Engler Company is a corporation, as alleged, having its place of business at the city of Dubuque, Iowa; that on the 20th day of October, 1894, it delivered to the Chicago, Milwaukee & St. Paul Railway Company, at Dubuque, the property mentioned in its petition, consigned to the May & Thomas Hardware Company, at Birmingham, Alabama, by way of East St. Louis, and was loaded in car of the Rock Island & Pacific Railway Company, No. 1004, and was to be transported to destination, pursuant to the bill of lading issued therefor, which bill was attached to the stipulation; that while said property was in transit it was destroyed by fire at East St. Louis on the evening of the 28th day of October, 1894; that at the time it was destroyed the petitioner was the owner, and that the property was of the value of $777.28; and petitioner was damaged in that sum, and shall be entitled to recover that amount, if it shall be adjudged that it is entitled to recover in this proceeding.

After the facts were stipulated as above set out, both parties proceeded to the taking of testimony as to the question whether or not at the time the loss occurred, the property was in the possession of your petitioner, as such receiver. On this point the evidence shows that, after your petitioner received said car at Pekin, Illinois, he hauled the same to a point immediately beyond the terminus of his own rails at

East St. Louis, and placed said car on certain "Y" rails of the Terminal Railroad Association, reaching that point about 3 o'clock on the afternoon of October 28th, 1894; that the servants of the Terminal Railroad Association of St. Louis, in the usual course of employment by that company, then hauled the car to a certain customary halting place on the premises of their employer; using for the purpose an engine which belonged to their employer; here they left said car stationary, until the evening of that day, when it was destroyed by fire; and that in the usual course of business the Terminal Association, after obtaining from the receiver a way-bill or memorandum, indicating the ultimate destination of said car, would have hauled the same over its own rails in East St. Louis, or over rails subject to its control for that purpose, and delivered the same to a carrier on whose rails the transit south was to continue.

The evidence further showed that the Terminal Railroad Association, in fact took, and at the time of the loss, had the actual physical custody and care of the property; that the haul over the tracks of the Terminal, from the point where the receiver's servants parted from the car, to the point where the loss occurred, was a portion of the transit to be made in any case, no matter what the ultimate destination of the car might be; that for the purpose of moving the car thus far the information as to the ultimate destination, which

a way-bill would have given was not needed; that no way-bill had up to that time been delivered, but that it does not appear that the lack of the information contained in such way-bill contributed in any way to the loss; that it further appeared that in the carrying business conducted by the Terminal Association the car in question would remain stationary for a time, and thereafter be hauled, probably with other cars, grouped for the purpose, to the starting place of the carrier who was to take it south; that information as to the ultimate destination and route had not as yet been actually imparted by the receiver to the Terminal Association, but that the latter was content for the time being, to treat such information, then in the possession of the receiver, as sufficiently available to itself.

On the 10th day of April, 1896, the Master in Chancery, to whom said intervening petition was referred, filed his report, in which he found that the said car and its contents were held by the receiver as a common carrier at the time of its loss; and that the intervener had a just claim against said receiver in the sum of $777.28.

On the 27th day of April, 1896, the receiver filed his exceptions to the said master's report; that the same were overruled, and said report approved on the 3d day of March, 1897; that on the 5th day of April, 1897, a decree was entered by the United States Cir-

cuit Court for the Southern District of Illinois, confirming the said master's report and ordering said receiver to pay to intervening petitioner the said sum of $777.28, with interest.

On the 5th day of April, 1897, the receiver prayed for, obtained and perfected an appeal to the United States Circuit Court of Appeals for the Seventh Circuit from the said decree of the United States Circuit Court for the Southern District Illinois, and duly assigned his errors on the record.

Said appeal came on for hearing in said Circuit Court of Appeals before their Honors, Judges Woods, Jenkins and Showalter, and was argued in said Court, and subsequently, on the 25th day of February, 1898, the said Circuit Court of Appeals handed down its decision wherein and whereby the said decree of the United States Circuit Court for the Southern District of Illinois was affirmed, His Honor, Judge Showalter, dissenting therefrom; a copy of which opinion is attached to the transcript of record certified to this court.

Thereafter, on or about the 25th day of March, 1898, the receiver filed his petition in said Circuit Court of Appeals for a rehearing, which petition was subsequently on or about the 1st day of April, 1898, overruled, a copy of which petition is also attached to the transcript of record certified to this court.

A large number of intervening petitions were filed in the foreclosure cause pending in the United

for the Southern District of Illi-
States Circuit Cou ing out of this same fire; that the
nois, for claims ar found the receiver liable in each
Master in Chancer ses; that for the purpose of avoid-
and every of the c an appeal in each and every case,
ing the expense o en counsel that four different cases
it was agreed betv and stipulations were entered into
should be appeale s should abide the result of the
that the other cas l; that of the cases appealed all
cases thus appeal d shipments of barley to grain
except this invol the grain exchange in St. Louis;
brokers, for sale c was shown that an agreement ex-
that in the trial it grain brokers and the Terminal
isted between thes n, by which the latter was to hold
Railroad Associati e on its tracks in East St. Louis
such barley in st ld be sold; that by reason of this
until the same co other things, the Circuit Court of
agreement, among he decree of the Circuit Court en-
Appeals reversed other appeals; that all four of
tered in the thre submitted to and were considered by
these appeals wer als at one hearing, and one opinion
the Court of App all; that in that opinion the Court
rendered to cover d that inasmuch as the agreement
of Appeals declar no application to the Carr, Ryder &
as to barley had decree of the Circuit Court in favor
Engler case, the was right; the Court of Appeals was
of that company t though in the physical possession
of the opinion th car (in the case at bar), the Ter-
of this particular had not become responsible as a
minal Association

carrier therefor, because it had not been put in possession of a way-bill or other form of information on which it could proceed with the carrying.

NOTE.—By reason of the fact that the evidence in this case was also taken in that of Jacob Rau vs. C. H. Bosworth, Receiver, it was agreed to print only one record, and the references in this brief to record pages are to the record in the Rau case, October Term, 1898, No. 285 (16,858).

BRIEF.

I.

Delivery pursuant to custom or agreement is sufficient.

(a) At common law a carrier is not bound to carry beyond its own rails.

Michigan Cent. vs. Mineral Springs, 16 Wall., 324;

Atchinson Ry. vs. Denver Ry., 110 U. S., 667;

Ogdensburg vs. Pratt, 22 Wall., 129.

St. Louis Insurance Co. vs. St. L. R. R. Co., 104 U. S. 685.

P. C. & St. L. R. R. vs. Morton. 61 Ind., 539.

(b) This shipment was set to a designated place of deposit.

II.

Issuing of way-bill by the Receiver to the Terminal Association was not necessary to constitute delivery.

(a) Such way-bill is simply evidence of delivery, which may be shown by other competent evidence.

III.

The Agreement with the Terminal Association was not a lease by which the Receiver's rails were extended into East St. Louis.

IV.

The Agreement between the Receiver and the Terminal did not make them principal and agent.

V.

The Terminal Association had received shipping directions.

VI.

The carrier which had possession of the freight at the time of the fire is liable.

P. C. & St. L. Ry. vs. Morton, 61 Ind., 539;

Ogdensburg vs. Pratt, 22 Wall., 129;

Mich. Cent. vs. Mineral Springs, 16 Wall., 324;

St. Louis Ins. Co. vs. St. Louis R. R. Co., 104 U. S., 685.

(a) If there was an express contract, it was for through carriage.

Evansville & Crawfordsville Ry. Co. vs. Androscoggin Mills, 22 Wall., 594.

(b) The appellee is estopped to deny this contract; and it inures to the benefit of each succeeding carrier.

Manhattan Oil Co. vs. Camden & Amboy Railroad, 54 N. Y., 197.

Comden & Amboy Railroad vs. Forsythe Bros., 61 Pa. St., 81.

*Taylor vs. Litt*l 12
*Eng. Railroc*le Rock Railroad, 18 Am. &
*Whitworth vs. L*nd Cases, 590-596 and Notes.
*Railroad Ca*Erie Railway, 6 Am. & Eng.
*Western Railwa*ses, 349.
*Maghee vs. C. &*y vs. Harwell, 91 Ala., 340.
*Lawson Contract*A. Railroad, 45 N. Y., 514.
—— of Carriers, 362 et seq.

AR——————

GUMENT.

The question prese nted by this application is: Did the Court of Appeals for the Seventh Circuit err in holding, notwithstanding the fact that pursuant to custom and agreement the appellant had deposited the car in controversy on the certain designated "Y" of the next connecting carrier, and that carrier had taken actual physical possession and control of the same, yet the appellant was still liable as a common carrier, for the sole reason that it had not forwarded to the connecting carrier a way-bill showing the ultimate destination of the car.

I.

Delivery pursuant to custom or agreement is sufficient.

Can delivery to a connecting carrier be made only by communicating complete and ultimate shipping directions to the succeeding carrier, or is a sufficient delivery made when the connecting carrier takes

actual physical possession for the purpose of hauling the car a certain distance on its rails, and there, pursuant to long established custom, to await the coming of the information as to the ultimate destination?

It is not necessary to antagonize the general rule that a railroad cannot divest itself of a carrier's liability by delivering to the next connecting carrier, unless such delivery is accompanied with the necessary shipping directions for the further transportation of the goods, in order to sustain the exceptions to it which have their foundation in custom and agreement.

(a) **At common law a carrier is not bound to carry beyond his own rails.**

By a reference to the bill of lading in this case (R. p. 39) it will be seen that there was no express contract of carriage between the shipper and this receiver, and therefore the only contract in existence is that which is implied in the common law by his acceptance of the goods for carriage. That such a contract is one simply to safely carry and deliver to the next succeeding carrier, hardly needs the citation of authorities to sustain. His duty is fulfilled when he has done that, and so in the very beginning we see that he was under no obligation to carry this car beyond his own rails.

Michigan Cent. vs. Mineral Springs, 16 Wall, 324;
Atchinson Ry. vs. Denver Ry., 110 U. S., 667;

There is no question in this record but that this car had been hauled the entire length of the receiver's rails, which terminated at Bridge Junction and had been deposited on the rails of the Terminal Association; but it is contended that, inasmuch as the receiver had no terminal facilities at East St. Louis, a point beyond his line, that the receiver was bound to provide such facilities, and having entered into a written agreement with the Terminal Association by which the latter was to handle and care for freight coming from the receiver's road and going through or to that place' such agreement made the rails of the Terminal the receiver's rails. The construction of this agreement we will discuss later; we simply desire now to assert the proposition that the receiver was under no obligation, by express or implied contract, to furnish to this shipper on account of this shipment such facilities beyond his own rails in East St. Louis.

(b) This shipment was set to a designated place of deposit.

Independent of the written agreement referred to, the record shows that the car in question was hauled by the receiver to a point on a certain "Y" belonging to the Terminal, where, according to the custom existing between the two carriers, the latter sent its own servants with its own engine, took physical possession of the same, and thereafter handled the same exclusively by its own employes. (R. p. 74, 207, 219, 224.)

In addition to this it was the custom of the Terminal to immediately take a record of all such cars deposited on this "Y" (R. p. 75, 77, 84, 97), as having been delivered to it on the day of their arrival. It had men especially employed for that purpose. It did not wait until it received a way-bill before making a record of such delivery. (R. p. 102.)

When it is considered that the contract under which the receiver was acting in no way obligated him to carry this shipment beyond his own rails, and that the record shows he carried it to the end of his rails and deposited it at a certain place, designated by custom, on the rails of the connecting carrier, which took *actual physical possession* of it, we submit that a prima facie case of delivery has been made, notwithstanding no ultimate shipping directions had been forwarded.

In support of this we rely on the law as laid down by this honorable Court in the case of *Pratt vs. Grand Trunk Railway, 95 U. S., 43.* There the goods had been shipped from Liverpool to St. Louis in packages marked "P. & F. St. Louis." They were carried by the Grand Trunk Railway to Detroit, where they were destroyed by fire, under circumstances almost identical with the facts in the case at bar, and a delivery was held to have been made to the connecting carrier. In the opinion of the court it is said:

"At the time the fire occurred the defendant had no freight room or depot at Detroit, except a single apartment in the freight depot of the Michigan Central Railroad Company. Said depot was a building several hundred feet in length, and some three or four hundred feet in width, and was all under one roof. It was divided into sections or apartments, without any partition wall between them. There was a railway track in the center of the building, upon which cars were run into the building to be loaded with freight. The only use which defendant had of said section was for the deposit of all goods and property which came over its road, or was delivered for shipment over it. This section, in common with the rest of the building, was under the control and supervision of the Michigan Central Railroad Company, as hereinafter mentioned. The defendant employed in this section two men, who checked freight which came into it. All freight which came into the section was handled exclusively by the employes of the Michigan Central Railroad Company, for which, as well as for the use of said section, said defendant paid said company a fixed compensation per hundred weight. Goods which came into the section from defendant's road, destined over the road of the Michigan Central Railroad Company, were, at the time of unloading from defendant's cars, deposited by said employes of the Michigan Central Railroad Company in a certain place in said section, from which they were loaded into the cars of said latter company by said employes when they were ready to receive them; and, after they were so placed, the defendant's employes did not further handle said goods. Whenever the agent of the Michigan Central Railroad Company would see any goods deposited in the section of said freight building set apart for the use of the defendant, destined over the line of said Central Railroad, he would call upon the agent of the defendant in said freight building, and, from a way bill exhibited to him by said agent, he would take a list of said goods, *and would then, also, for the first time learn their ultimate place of destination*, together with the amount of freight charges due thereon; that from the information thus obtained from said way-bill in the hands of the defendant's agent, a way bill would be made out by the Michigan Central Railroad Company for the transportation of said goods over its line of railway, and not before.

These goods were, on the 17th of October, 1865, taken from the cars and deposited in the apartment of said building used as aforesaid by the defendant, in the place assigned as aforesaid for goods so destined.

At the time the goods in question were forwarded from Montreal, in accordance with the usage in such cases, a way-bill was then made out in duplicate, on which was entered a list of said goods, the names of the consignees, the place to which the goods were consigned, and the amount of charges against them from Liverpool to Detroit. One of these way-bills was given to the conductor who had charge of the train containing the goods, and the other was forwarded to the agent of the defendant in Detroit. On arrival of the goods at Detroit the conductor delivered his copy of said way-bill to the checking clerk of defendant in said section, from which said clerk checked said goods from the cars into said section. It was the practice of the Michigan Central Railroad Company, before forwarding such goods, to take from said way-bill in the custody of said checking clerk, in the manner aforesaid, the place of destination and a list of said goods and the amount of accumulated charges, and to collect the same, together with its own charges, of the connecting carrier."

In commenting on this case, and in applying the rule of law there laid down to the facts in the case at bar, His Honor, Judge Showalter, in his dissenting opinion, filed in the Court of Appeals, (R. p. 402) says:

"It will be seen from the foregoing statement that on the course of dealing between the two carriers, *shipping directions had not been received by the connecting carrier.* The court mentions the mark on the goods, but not as a controlling factor in the decision. The Michigan Central Railroad Company did not look at the marks on the goods for the shipping directions upon which it acted. Under the mode of dealing between the two carriers, the case was the same as though there had been no marks on the packages. The goods were on the platform of the connecting carrier at the time of the loss. The defendant did not own or have any possessory right over that portion of the connecting carrier's station house. Defendant's servants were not privileged either to unload the

goods there or to handle the goods afterwards. The servants of the connecting carrier placed all goods which were to be forwarded as designated by the agent of the defendant at a particular locality on the platform in question. The defendant ceased to be and the connecting carrier became the bailee of the goods—*and this before the shipping directions had been given by the one carrier to the other, according to the understood mode of dealing between them.* This was a case in which the defendant did not own or possess the unloading platform. If the defendant had owned or possessed that section of the station where the goods were unloaded, the mere placing of the goods in controversy at a particular locality on the platform, from which the servants of the connecting carrier would afterward, without special license from the defendant, take them, would not have changed the custody of such goods. The law upon this point is clear. Nor would the connecting carrier have become bailee even if its agent had received the shipping directions before the destruction of the goods. The fact that the goods were still in the custody of the defendant would, from the standpoint of the shipper, have determined the matter. I may add that the Grand Trunk Railway Company had no terminal, that is to say, unloading facilities at Detroit, so far as concerned the owner of the goods in question. The section of the station in which the freight of the Grand Trunk Railway Company was unloaded was owned and possessed by the connecting carrier. In the case at bar the connecting carrier not only took exclusive possession of the cars in controversy at the terminus of appellant's rails, *but hauled them to a point on its own rails to which appellant had, neither in law nor by contract, even a right of access.*"

II.

Issuing of way-bill by the Receiver to the Terminal Association was not necessary to constitute delivery.

It was contended in the court below, that notwithstanding the *actual physical* delivery to the Ter-

minal Railroad Association, yet the receiver was responsible for the cars and contents up to the time he issued a new way-bill for them, and passed that way-bill on to the Terminal Association: Our reply is, that:

(a) **Such way-bill is simply evidence of delivery, which may be shown by other competent evidence.**

Therefore we insist that it is wholly immaterial and technical to object that, prior to the fire, no way-bill covering the ultimate destination had been passed over to the Terminal Association. At most, such way-bill or bill of lading is simply *evidence* of a delivery *and does not in itself constitute the delivery*, and if actual and physical delivery has been made, *it can be established by other evidence.*

For a court of equity to sustain the contrary contention, it will be compelled to ignore the actual physical delivery and require a technical one. Even courts of law have not done this.

In the case of *Illinois Central vs. Smyser, 38 Ill., 354*, where the goods had been placed in a car of the Railroad Company, with its assent, for the purpose of shipment, the loaded car being under the exclusive control of the company, the court held that the goods thereby passed into the possession of the company as effectually as if they had been delivered in its warehouse. In the opinion of the court it is said:

> "*The said track and cars belonged to the company and are under their exclusive control*, and there is no question that the company placed this car at a point opposite the wharf boat on which the cotton was stored, for the express purpose of having it transferred from the boat to the car, that they might transport it to the point desired by the shipper. *The company had the exclusive use and control of their road, said tracks, and their cars;* no use could be made of them without the consent of the company. They had the right to permit their cars to stand at the point at which this one was placed. The company at any moment, at least after the car was loaded, had the unquestioned right to remove it to any other part of their road, but the commission merchant had no such right, even if he had possessed the means. He simply had the right to load the cotton on the car."

Applying the evidence in that case to the facts in the case at bar, the Court must be struck by their similarity. There is no question but that the tracks upon which these cars stood, at the time of the loss and damage, belonged to the Terminal Railroad Association and were under its exclusive control. Concede, if you please, that these cars were being handled under the contract referred to in the evidence, between the Terminal Railroad Association and the old Chicago, Peoria & St. Louis Railway Company; that contract contained no provision by which the Terminal Railroad Association gave up any right to its exclusive control over its tracks. On the contrary, the Terminal Railroad Association always sent its own engines up to the "Y" tracks, and hauled the cars down to their yards, not even permitting the engines of the railway company or the receiver to come upon its tracks.

It was also attempted in the evidence to show that the Terminal under this contract set apart certain tracks for the use of the Chicago, Peoria & St. Louis Railway Company, but this wholly failed, inasmuch as it was established by a preponderance of the evidence that the Terminal Railroad Association used the tracks indiscriminately for other customers, and even went so far as to rent out and convert a warehouse, which was situated in their midst, into a veritable fire trap. (R. p. 195-8, 212-213.)

Again, using the same language of the Court in the *Smyser case, supra*:

> "They (the Terminal Railroad Association) had the right to permit their cars to stand at the point at which this was placed. The company (the Terminal Railroad Association) at any moment, at least after the car was loaded—(these cars were loaded) had the unquestioned right to remove it to any other part of their road (yard), but the commission merchant (the receiver) had no such right, even if he had possessed the means. He simply had the right to load the cotton in the car.". (Words between paranthesis are ours.)

The receiver simply had the right to deposit the cars on the "Ys" at the terminus of his road in such a way as to permit the Terminal Railroad Association to attach its engines thereto.

Continuing, the Court in the *Smyser case, supra*, says:

> "The wharf boat, on the contrary, with its contents, was in the possession of the commission men, and the cotton so continued until it was placed in the cars. It then passed into the possession of the company as un-

> doubtedly as if it had been delivered in their warehouse, no doubt for the mutual convenience of all parties. And this, too, with the assent of the company, to promote their interest in the transaction of the business for which it was created."

Now, as to the assent of the Terminal Railroad Association, we admit the same is necessary to complete a delivery. On that point can it be contended for a moment that its assent is not to be presumed from the fact that it sent its engines up to the "Y" tracks, broke up the receiver's train, attached to the cars and hauled them down into their own yards and on their own tracks, and there deposited them? Can it be contended that the Terminal Railroad Association's assent is not to be presumed or implied from the fact that it attached its engines to the cars, and by its own servants hauled them to a certain point on its own rails?

And so the Court in the *Smyser case*, says:

> "No difference is perceived in receiving freight on the platform of their depot and into their cars at any place on their road or side track; or whether it is placed there by their own employes or by other persons, *so it is done with the assent of the company.*"

In that case the same contention was made as to a bill of lading not having been made out, as in the case at bar a way-bill for these cars had not been delivered to the Terminal Railroad Association. On that point the Court said:

> "*It is not the simple signing of a bill of lading which transfers the possession of freight to the company*, but it is evidence that they have received possession. *Their possession*

may be shown by any other legitimate evidence. The bill of lading of a common carrier is fixed by accepting the property to be transported. If, however, goods are placed on his boat or car, without his knowledge, *or that of his agent*, he is not liable. *Angel on the Law of Carriers, Sec. 140*, says: 'When the person having the custody of the goods to be shipped never parts with their possession or places them upon the carrier, there is no bailment, and consequently no liability incurred.' *Ibid.* But in this case the company by their acts accepted the trust. The cotton was not placed in the car without their knowledge, but it was with their express assent. Had the employes of Williamson, Haynes & Company placed the cotton on the platform of the depot without the assent of the company to be transported, no one would doubt their liability: and yet in principle no difference is perceived."

We, therefore, insist that by the act of the Terminal Railroad Association, in making a record of the arrival of the cars, in attaching its engines to them, and depositing them on its own tracks, it knew the car was in transit, and according to the established custom, hauled the car to a certain point on its own rails, and was there content to hold it until the way-bill came in the usual course of business.

To show how utterly immaterial this act of delivering a way-bill or sending a junction report is to the actual delivery of the cars, let us place the "shoe on the other foot," and ask the question: "If there had been a new way-bill issued, but no actual physical delivery of the cars, would this Court hold the party to whom the way-bill had been issued responsible for

the care, custody and control of the cars?" The answer to this is found in *Missouri Pacific vs. McFadden, 154 U. S., 155*, where the Court said:

> "All of these allegations in the answer were, of course, admitted by the exception, and, therefore, the case presents the simple question of whether the carrier is liable on a bill of lading for property which, at the time of signing of the bill, remained in the hands of the shipper for the purpose of being compressed for the shipper's account, and was destroyed by fire before the delivery to the carrier had been consummated. The elementary rule is that the liability of a common carrier depends upon the delivery to him of the goods which he is to carry."

Continuing further, the Court, quoting from *King vs. The Lady Franklin, 8 Wall, 325*, speaking of a bill of lading, says:

> "It is an instrument of a two-fold character. It is at once a receipt and a contract. In the former character it is an acknowledgement of the receipt of property on board his vessel by the owner of the vessel. In the latter it is a contract to carry safely and deliver. *The receipt of the goods* lies at the foundation of the contract to carry and deliver. If no goods are *actually* received, there can be no valid contract to carry and deliver."

And continuing the Court thus characterizes that rule:

> The rule thus stated is the elementary commercial rule. Indeed, in the case last cited this Court expressed surprise that the question should be raised. This view coincides with the rulings of the English Courts."

III.

The Agreement with the Terminal Association was not a Lease by which the Receiver's Rails were extended into East St. Louis.

Opposing counsel sought to meet the prima facie case of delivery thus made by the receiver, by construing the agreement which existed between the Terminal and the receiver as a lease of the rails of the former to the latter, and upon this base their argument that the car, at the time of its destruction, was still in the possession of the receiver.

We desire to recur to the fact that the rails of the receiver terminated at a station called Bridge Junction, and did not extend south of the road marked "Stockyards Avenue" on the plat opposite page 100, in the record. Opposing counsel have assumed from the statement in the first clause of this agreement that the Terminal Association "undertakes to give the party of the second part terminal facilities at East St. Louis," that the receiver had no terminal facilities at the terminus of his line. This assumption is unwarranted by the facts. In connection with this shipment it was not considered necessary to show that the receiver had terminal facilities at the end of his line, since this shipment was a through shipment, and not

expected to be handled l in the receiver's yards at the
terminus of his rails, but from the first was intended
to be "set to" the trac cks of the Terminal Association,
as the next connecting g carrier. Therefore no direct
evidence of terminal fa acilities were introduced. How-
ever, by a reference to o the "plat of railway yards" in
this record (R. p. 100) it will be seen at the bottom
of the plat, and toward d the middle, the beginning of
yards marked "J. S. E. freight yards."

"J. S. E." was the e common name by which the
railroad operated by the receiver had heretofore been
known. (R. p. 18.) This identity is also shown by
the fact that the line of railroad belonging to the C.
P. & St. L. Railway is designated on this plat as the
"Jacksonville Southeastern R. R." These "J. S. E.
freight yards" are referred to and identified by the
testimony of the receiver himself, (R. p. 222) and oppos-
ing counsel tried hard to get him to say that he had
no terminal facilities but did not succeed. Therefore,
this agreement was not entered into for the purpose
of supplying any deficiency in the line of railroad
which the receiver was operating for the purpose of
complying with his common law obligations as a carrier.

The agreement was simply for the purpose of se-
curing a certain and definite rate to be paid to the
Terminal Association for switching through cars to
and from the rails of the receiver and other compan-
ies in the vicinity of East St. Louis, and to provide

beforehand for ample and quick handling of such through freight, so that the receiver's own terminal facilities would not become clogged or over-taxed by the accumulation there of such through freight in addition to that which was purely local and destined only to East St. Louis.

In this connection it is well to consider the nature of the railroad of the Terminal Association, and the character of the business that it solicited and carried on. By a glance at the plat (R. p. 100) it will be seen that the rails of the Terminal connect with all of the many railroads centering in East St. Louis; this taken with the name of the Association points directly to the fact that it is a switching railroad, which serves all other railroads centering in East St. Louis by delivering cars from one to the other, precisely as it served the receiver.

As a matter of fact, it could have been shown that the Terminal Railroad Association has the same sort of an agreement with every other railroad entering East St. Louis, as it has with the receiver.

Unless, therefore, it can be said that the mere fact of the Terminal Association being a switching railroad, whose main business is simply the switching of cars from one railroad to another, prevents it from assuming the character and liability of a common and connecting carrier for the cars, while they

are in its possession, in the course of such transportation from one railroad to another, then we submit that the existence of such an agreement as that of August 1, 1892, does not in itself change the relations between the Terminal Association and other railroads, from which it receives cars.

In *Missouri Pacific R. R. vs. Grocery Co., 55 Kan. 525*, we find a logical statement of the reason why the mere fact that a railroad is a switching railroad does not relieve it of the liability of a connecting carrier. In that case a car-load of sugar sent from Louisiana was consigned to the plaintiff, a grocery company at Wichita. It was shipped over the Texas & Pacific Company's line, and was brought to Wichita by the St. Louis & San Francisco Company. It was there placed on the "Y" and switched by the defendant company over its tracks to the spur track in the rear of the plaintiff's warehouse, for which service the St. Louis & San Francisco Company paid their regular switching charge of two dollars per car. The court held that the defendant was liable as a common carrier for a loss occurring after it had taken charge of the shipment, and before the plaintiff had had reasonable time in which to remove it, among other things saying:

> "A railroad transporting a passenger or a car load of freight one mile, using a switch engine for motive power, is just as much a common carrier as if the distance were a thousand miles by regular freight or passenger train. The fact that compensation for this particular service was paid by the St. Louis & San Francisco Railroad

> Company, while it might render that company also responsible, it could not relieve the defendant company from its liability as a carrier."

To sustain the contention that the agreement of August 1, 1892, excluded the relation of connecting carriers between the two companies, or that the contract itself made them respectively principal and agent as to the interchange of all traffic between them, it is absolutely necessary to ignore the fourth provision of the contract which is: (R. p. 100.)

> "Fourth. All cars consigned to and from the East St. Louis freight house of the party of the second part, to be switched to and from the Wiggins Transfer tracks without extra charge. Regular switching charges and rules to apply to all other cars to and from connections, the party or the first part to be governed in making its collections by instructions shown on bill to it, as to who should pay. In the absence of any instructions the switching charges will follow the car."

This clause expressly recognizes and provides for that interchange of traffic which occurs between connecting carriers, and contemplates the existence of that relation in just such a case as the one at bar. By that clause provision is made that the regular switching charges and rules shall apply on all other cars, to and from connections; that is, that the regular switching charges shall apply to such a car as the one in question, which necessarily had to pass over the tracks of the Terminal Association to the tracks of other railroads connecting with the latter.

According to the custom which existed between the two companies, such cars as the one in question,

were placed upon the designated "Y" of the Terminal Association, and when the latter company found cars thus placed, it knew that they were to be transported over its rails to the rails of some other railroad, and for that purpose it took possession of them by its own employes and attached its own engine to them and hauled them to a point on its own rails, where it was convenient for it to hold them until it received the ultimate shipping directions, namely, the ultimate destination, so that it would know to which railroad to set it.

Now it is to be remembered that this contract does not provide that *certain* yards or *any special* place or territory in the yards of the Terminal Association are to be set aside for the *exclusive* use of the receiver, *in the sense that he was to exercise any dominion over or have any possessory right therein.* Nor does the evidence in fact show that any particular portion of the yards were set aside for the *exclusive* use of the receiver.

John Weidmer, of the Gratiot Street Warehouse Company, testified that he rented of the Terminal Association a warehouse which was right in the middle of that part of the Terminal's yards, which opposing counsel refer to as the appellant's "portion" of these yards; that some of the tracks ran through the warehouse; and that he rented from the Terminal on the understanding that it had full control. (R. pp. 196-7.)

The servants of the Terminal Association may have been accustomed to haul cars from the receiver's road to some special territory in the yards of the Terminal, and that territory may for the time being have been "the yards set aside for the use" of the receiver, within the sense of the second section of the contract, *but such servants did not do this by any direction from the receiver;* nor was there any right in him to direct or control them, or to designate the place on the grounds, or rails of the Terminal Association where any car received from his road should be at any given time in any way recognized. (R. p. 184-8, 201.) *This was the construction given to the contract and acted on by the parties.*

The agreement will be searched in vain for words of conveyance. There can not be found in it any transfer of any estate in the grounds or tracks, or any part thereof, or of any possessory interest in its engines, or control over its servants, from the Terminal Association to the receiver.

The conduct of the Terminal Association at the very fire which caused this great loss emphasizes the absence of any attempt on the part of the Terminal to make any such transfer by this agreement. As soon as the fire broke out, the receiver had an engine close by on his own rails, and his employes attempted to go in and hitch onto these cars and pull them away from the burning warehouse, but were prevented from

so doing by the employes of the Terminal (R. p. 193). The evidence further shows that while a great many of the cars which came off of the receiver's road were set on to certain tracks by the Terminal Association, yet it further shows that this was not always the case, and that the Terminal would take the cars to any part of its vast yards which was most convenient to it, and there mingle them with cars from other railroads, and that after the Terminal had taken possession of such cars on the designated "Y," the receiver could in no manner direct the point to which they were to be transported on the rails of the Terminal. (R. p. 183-187.) In other words, the evidence conclusively shows that the receiver had no use, direction or control over any portion of the Terminal yards.

Therefore we earnestly submit that the contract in question is nothing more than the result of precautionary measures on the part of the receiver for the prompt and adequate handling of *through* freight by his connecting carrier, the Terminal, and *beyond this* is nothing more than a *division of the freight charge between the two connecting carriers.* As His Honor, Judge Showalter, in his dissenting opinion filed in the Court of Appeals, said (R. p. 359):

> "As said above the shipper pays no more than if the appellant had himself owned and operated the lines of the Terminal Association. Such a contract could not interfere with or modify the legal obligation of either carrier to a shipper whose goods are handled successively by both. Neither appellant nor the Terminal Associa-

tion could evade or alter any legal obligation to a third party by any contract between themselves. If the Terminal Association had alienated to appellant an actual ownership or possessory right over that portion of its tracks where the cars in controversy were destroyed, and such a control over its employes and engines, that said employes when engaged in handling the cars in question were the servants of appellant, and the engine used by them, his engine, for the time being, the case would be different. On this hypothesis, the tracks where the cars were destroyed would have been appellant's tracks, the employes who hauled the cars to that point his servants, the engine used by them his engine, he would have continued to be the bailee of the property, and the matter of way-bills or junction reports would have signified nothing. But in my judgment, as said, *the contract in question had no force as of alienation* by the Terminal Association to appellant of any possessory right, interest or estate in or over any property of the former company, or of any control over its servants. Neither the relation of lessor and lessee, nor that of licensor or licensee existed between these parties as resulting from said contract so far as it concerned the cars and contents in question."

IV.

The Agreement between the Receiver and the Terminal did not make them principal and agent.

It was also argued in the courts below that the agreement of August 1, 1892, between the Terminal Railroad Association and the Chicago, Peoria & St Louis Railway Company made the former the agent of the latter. In the opinion of His Honor, Judge Jenkins, it will be seen that he also is inclined to this view.

From an inspection of this agreement (R. p. 100) it will be found that the Terminal Railroad Association only agreed to furnish necessary yard room and track facilities in their yards at East St. Louis for the purpose of handling such freight as might originate on the line of the Chicago, Peoria & St. Louis Railway Company, or be received by that railway company from other lines to be carried to St Louis or points beyond St. Louis over the rails of the Terminal Association. For this service the Terminal was to receive the customary charges for the handling of each car, just as any other connecting carrier would receive.

A case which is analogous to the one at bar is *St. Louis Insurance Company vs. St. Louis, Vandalia, Terre Haute & Indianapolis R. R. Co., 104 U. S., 146.* There this Court held that an arrangement between a Dispatch Company and sundry railroad companies, whose lines terminated at New York, whereby the latter, separately agreed to carry all goods for the transportation of which the former should contract, at the established tariff rates, did not involve a joint liability on the part of the railroad companies, nor make the Dispatch Company the agent of the railroad companies, the Court saying:

> "The Dispatch Company and the defendant had, it is true, certain business relations, but those relations did not necessarily involve an agency upon the part of the former for the latter, in the making of contracts for transportation. The agreement between those companies only bound the railroad company to 'receive, load and

> unload, deliver and way-bill' such freight as was sent to it by the Dispatch Company, and at the rates established, not by the latter, but by the defendant and other railroad companies."

So we submit, in the case at bar, that the agreement between the receiver and the Terminal Railroad Association only bound the latter to properly take care of and handle all freight which the former might deliver to it on the designated "Y," and at the rates established, not by the receiver, but by the Terminal.

It might as well be argued that every railroad company which enters into an agreement with a coal company to furnish it so many cars a day and to haul those cars at a certain price, thereby becomes the agent of the coal company, or thereby leases to it the cars and that portion of the rails necessary to make the haul contemplated.

V.

The Terminal Association had received shipping directions.

In view of the custom which existed between the two companies by which the Terminal Association was to take a record, and take possession of, a car which the receiver placed on its rails, we submit that the depositing that car on the designated place is tantamount to a shipping direction.

The Terminal Association voluntarily accepted such cars from the receiver knowing them to be, at the time of such acceptance, in transit. The mere fact of the cars being at the designated place, had always been accepted by the Terminal as notice to it that such cars were in transit, and were to be hauled over its rails, either to some other railroad or into the city of St. Louis. With this knowledge and notice, the Terminal Association was accustomed to haul these cars to a certain point on its rails and there await further information from the receiver as to the ultimate shipping direction. The Terminal knew when it took possession of them, that they were *never* to be handled by the receiver again under the bill of lading or way-bill which accompanied them.

Ultimate shipping directions as between these two companies were regulated by an understood course of dealing between them. Such a car, for instance, as the one in question, should in any case and by reason of the peculiar character of the carrying business conducted by the Terminal Association, remain for a time stationary at some point on its rails most convenient to it. A certain portion of the transit could be traversed by the Terminal whether the ultimate shipping directions were contemporaneous with the delivery or came some hours later. As to this car, following the custom, the receiver had not at the time sent such ultimate directions, but they would have

come in due course had the car not been destroyed, and would have been within ample time to suit the convenience of the Terminal Association in moving this car on to the rails of its next connecting carrier.

A state of facts very similar to this was attempted to be proven in the case of *Mt. Vernon Co. vs. Alabama R. R., 92 Ala., 296.* The car in question was brought to the place of junction between the connecting carriers, which was a station called Attala, and there placed by defendants' servants on a sidetrack belonging to the connecting carrier, which the latter was expected to move along towards the place of ultimate destination. No notice of this was given to the connecting carrier, and the car was destroyed on the side track. There the defendant undertook to prove that, by a course of dealing between itself and the connecting carrier, the latter was accustomed to receive on said side track and haul over its rails to the Chattanooga Compress, cars laden with cotton, and there await the way-bill or ultimate shipping direction. In this matter of proof, however, it was unsuccessful. But the court was evidently of opinion that if the car in question had been so taken and hauled to the Chattanooga Compress, it would have been delivered, suggesting that such a course of dealing would have been tantamount to a shipping direction to the connecting carrier to haul the car, as far, at least, as the Chattanooga Compress.

So in the case at bar, the Terminal Association knew, when it found this car in question on this "Y," and took possession of it, that it was to be hauled over its own rails, in any case as far as to the place of loss. For that much of the transit over its own rails, the Terminal Association needed no further shipping directions.

We therefore submit that, under these circumstances, all the regulations prescribed by the custom were complied with by the receiver, and the delivery to the Terminal was sufficient to charge it with the liability of a connecting carrier.

VI.

The carrier which had possession of the freight at the time of the fire is liable.

As we have heretofore said, the contract under which the receiver undertook to carry these goods was implied from his act of receiving the same for transportation, and that therefore under the common law rule it is only necessary for him to carry them to the end of his own rails and deliver them to the next connecting carrier, since the implied obligation of a carrier to the public is limited by the termini of his own route.

P. C. & St. L. Ry. vs. Morton, 61, Ind., 539;
Ogdensburg vs. Pratt, 22 Wall., 129;
Mich. Cent. vs. Mineral Springs, 16 Wall., 324;
St. Louis Ins. Co. vs. St. Louis R. R. Co., 104 U. S., 685.

(a) **If there was an express contract, it was for through carriage.**

If, however, it can be said that the carriage by the receiver was pursuant to an express contract, that contract is to be found on the bill of lading (R. p. 40) which among other things contains this stipulation:

> " * * * It is further specially agreed that for all loss and damage occurring in the transit of such packages, the legal remedy shall be against the particular carrier or forwarder only, in whose custody the said packages may *actually* be at the time of the happening thereof, it being understood that the said Chicago, Milwaukee & St. Paul Railway Company assumes no other responsibility for their safe carriage or safety than may be incurred on its own road."

Upon reference to the bill of lading exhibited by the appellee at Record page 40, it will be seen that it was issued by the St. Paul Railway, and was headed;

CHICAGO, MILWAUKEE & ST. PAUL RAILWAY CO.
ALL RAIL
THROUGH FAST FREIGHT LINE.
BONDED
J. H. HILAND, General Freight Agent, Chicago.

Upon reference to the joint tariff sheets, (R. pp. 269-271) the names of the parties publishing the "Joint

Tariff Circular" are given as the "Chicago, Milwaukee & St. Paul Railway, Rock Island & Peoria Railway and Jacksonville South Eastern Line," which was subsequently changed by the substitution of "Chicago, Peoria & St. Louis Railway, C. H. Bosworth, Receiver," in place and stead of "Jacksonville South Eastern Line."

These joint tariff sheets were signed by the respective general freight agents of the several companies named therein, and all shipments made thereunder and pursuant thereto were billed in conformity therewith.

The Supreme Court of the United States, in a similar case, held such recitals upon way-bills and such public professions to be conclusive evidence of a through contract of carriage.

Evansville & Crawfordsville Ry. Co. vs. Androscoggin Mills, 22 Wall, 594.

These public professions of a "through fast freight line" estopped the carriers from denying such through fast freight line and showed their intention to establish one.

(b) **The appellee is estopped to deny this contract.**

It is immaterial whether the shippers had any specific knowledge of the restrictions contained in this bill of lading, since they have placed it in evi-

dence and stipulated it to be the contract of carriage upon which they seek to hold the carrier. They can not recover on a portion of this contract and repudiate the other portion.

These rules and conditions are not unreasonable. They afford all needed protection to and are perfectly fair as between the several carriers making up the through route. And they inure to the benefit of each succeeding carrier in the line.

Manhattan Oil Co. vs. Camden & Amboy Railroad, 54 N. Y., 197.

Camden & Amboy Railroad vs. Forsythe Bros., 61 Pa. St. 81.

Taylor vs. Little Rock Railroad, 18 Am. & Eng. Railroad Cases, 590-596 and Notes.

Whitworth vs. Erie Railway, 6 Am. & Eng. Railroad Cases, 349.

Western Railway vs. Harwell, 91 Ala., 340.

Maghee vs. C. & A. Railroad, 45 N. Y., 514.

Lawson Contract of Carriers, 362 et seq.

If the shippers had not expressly, or by their course of business, assented to the said rules, stipulations and exemptions, they are estopped in equity and all good conscience from repudiating them, by their subsequent course in preparing, receiving and using

them as evidence of their contract and in support of their claims for loss filed against the receiver. They have *expressly stipulated* that their goods were to be:

> "transported to destination, *pursuant to* the bill of lading issued therefor, which bill of lading is attached to this stipulation, marked 'Exhibit A.' *and is made a part hereof.*" (R. p. 31.)

Is it equitable that station receipts, way-bills and bills of lading should be "split" and "spiked" so as to permit only the parts favorable to intervenors to be evidence?

Even admitting, for argument's sake, that they were defective in execution, or that they had not been read and accepted by the shipper, or that they were wanting entirely, surely the loss occasioned by any such neglect, failure or default should fall rather upon the initial carrier whose duty it was to look after such details, than upon the succeeding carrier, which had a right to presume that proper receipts and bills had been taken, and that they were in all respects customary, regular and in order.

On the other hand, if there was no through contract, the decision of the Supreme Court of the United States in the case of the *Insurance Company vs. The East St. Louis, Alton & Terre Haute Railroad Company, 104 U. S., 685*, establishes the proposition that the obligation of a carrier to the public should be limited by the termini of its own route.

"The rule that holds the carrier only liable to the extent of his own route and for the safe storage and delivery to the next carrier is in itself so just and reasonable that we do not hesitate to give it our sanction."

Mich. Cent. vs. Mineral Springs R. R., 16 Wall, 324.

St. Louis Insurance Co. vs. St. L. R. R. Co., 104 U. S., 685.

"The implied obligation of a carrier to the public is limited by the termini of its own route."

P. C. & St. L. R. R. vs. Morton, 61 Ind., 539.

"The fair result of the American cases limits the carriers' liability as such, when no special contract is made, to his own line."

Ogdensburg vs. Pratt, 22 Wall., 129.

The termini of the route of the appellant were unquestionably Pekin, Illinois and East St. Loius.

Therefore it is to be seen that either by the implied contract of carriage, or the express contract of carriage, the shipper must look to the carrier in whose custody the freight was *actually* at the time of its loss, and this carrier, we submit under the evidence in this case, and as a matter of fact, was the Terminal Railroad Association of St. Louis.

CONCLUSIONS.

Tried by these rules and conditions, the verdict as to the receiver must be at once—not guilty.

Nor will it escape the court that under the facts in evidence and wholly outside of and independent of written and express limitations; the receiver ought not to be held liable, either as carrier or as warehouseman.

First: Inasmuch as in the execution of his contract of carriage he had faithfully and safely carried the goods from Pekin to the end of his rails and to their destination at East St. Louis.

Second: Inasmuch as upon the weight of testimony and according to the letter and spirit of the contract the goods, at the time of their loss by fire, were in the actual custody of a succeeding carrier.

Third: Inasmuch as equity, as well as express contract stipulations, demands that the legal remedy for such loss should be against the particular carrier or forwarder only, *in whose custody* the goods *actually* were at the time of the happening thereof and through whose neglect the loss occurred.

Fourth: And so as to the origin of the fire and as to the handling of the same, why should a court of equity refuse to the receiver the full benefit of the overwhelming proof that it occurred after the Termi-

nal Company had taken possession of the goods in question, and stored them in its own yards on tracks exclusively under its own control and used indiscriminately for the business of the receiver and other carriers; that the fire broke out in a wooden building, (likewise under its full control,) in defective condition, stored with hay and recklessly exposed to sparks from its passing engines; and that after the said fire was under way the representatives and agents of the receiver, in matters of salvage, were either ignored entirely or rudely told to "go to hell!" (R. pp. 172, 182, 186, 192, 197, 162, 165, 72-76.)

In a like case ~~this~~ the court did not hesitate to concur in making the loss of cotton fall upon the carrier immediately responsible for its exposure to the fire.

Thomas. vs. Lancaster Mills, 71 Federal Reporter, 481.

Therefore, we urge that the decrees of the lower court should be reversed, and the cause remanded with directions to dismiss the petition at the cost of the intervenor.

Respectfully submitted,

Blanford Wilson

Philip Burton Warren

Solicitors for the Receiver.

No. 647. 289.
Brief of Peck & Hanson for
647
Respondent.
Filed April 29, 1898.

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1897.

C. H. BOSWORTH, RECEIVER OF THE CHICAGO, PEORIA AND ST. LOUIS RAILWAY COMPANY,

Petitioner,

vs.

THE CARR, RYDER & ENGLER COMPANY,

Respondent.

RESPONDENT'S BRIEF IN REPLY TO PETITION FOR WRIT OF CERTIORARI.

GEO. R. PECK,
BURTON HANSON,
Counsel for Respondent.

The Goudiery-Warren Printing Company, 53 Dearborn St., Chicago.

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1897.

C. H. BOSWORTH, RECEIVER OF THE CHICAGO, PEORIA AND ST. LOUIS RAILWAY COMPANY,

Petitioner,

vs.

THE CARR, RYDER & ENGLER COMPANY,

Respondent.

RESPONDENT'S BRIEF IN REPLY TO PETITION FOR WRIT OF CERTIORARI.

This case arises out of the same fire that do the cases of the Chicago, Milwaukee and St. Paul Railway Company, the Huntting Elevator Company and Jacob Rau against said Bosworth, as Receiver, in which petitions for writs of *certiorari* have been filed, and which will be presented to this court at the same time that the petition herein is presented.

The question, what constitutes a delivery of freight in carload lots, as between connecting carriers, is involved in each of the cases. In this case the decision of a majority of the judges of the Circuit Court of Appeals was against the Receiver—Judge Showalter dissenting—while

in the three cases above mentioned the decision of a majority of the judges was in favor of the Receiver—Judge Jenkins dissenting—Judges Woods and Showalter disagreeing, however, as to the grounds upon which their decisions were placed. The respect in which the cases differ, if at all, in their essential facts, will fully appear from our petitions and briefs in support thereof in those cases and to which the attention of this court is invited in the consideration of the petition in this case,

Respondent was a dealer in manufactured sash, door and blinds at Dubuque, Iowa. On the 24th day of October, 1894, it delivered to the Chicago, Milwaukee and St. Paul Railway Company at Dubuque a carload of said manufactured articles consigned to the May & Thomas Hardware Company, Birmingham, Alabama, by way of East St. Louis. In due course of transportation the car containing this property came into the possession of the Receiver's Company at Peoria, and was by that company transported to East St. Louis, the terminus of its road, where on the 28th day of October its contents were damaged by fire, the amount of the damage being seven hundred seventy-seven and 28-100 dollars ($777.28). At East St. Louis the Receiver's Company had no terminal facilities of its own. It therefore contracted with the Terminal Railroad Association for the necessary yard room and tracks for handling its cars, such as making and breaking up its trains, and switch engines and crews for switching its cars to and from its main track and the tracks which it had the use of under its agreement with that Association. The contract will be found on page 111 of the transcript of record. Upon the arrival of the train which brought the car in question to East St. Louis, it stopped at the end of the main track of the Re-

ceiver's Company, which was what is known in railroad parlance as a "Y" track. There it stood until a switch engine and crew of the Terminal Association coupled to it and switched the cars, including the car in question, to some one or more of the tracks which the Receiver's Company used under its agreement with that Association. For this service the Receiver's Company paid the Terminal Association fifty cents for each car so switched. Now the contention of counsel for the Receiver is that the act of the Terminal Association in switching this car from the Receiver's main track to the tracks which he used under his agreement with that Association constituted a delivery of the car and its contents to that Association, and that thereby and thereupon his liability as a carrier terminated. Circuit Judges Woods and Jenkins held that it did not constitute a delivery; that without the delivery of the customary way-bill containing the names of the consignor, consignee, route and destination and contents of the car, there could be no delivery of the car or its contents. And this for the reason that in the absence of the delivery of a way-bill, or of information that was its equivalent, there could not, under the circumstances, be a delivery of the car. And further, without such a way-bill the Terminal Association would have no reason to assume that the car was to be further handled or transported by it, nor would it know what the car contained, where it was destined, to whom it was to be delivered or the route by which it was to be transported. It is conceded that the way-bill for this car and its contents had not been delivered by the Receiver to the Terminal Association at the time of the fire. It is likewise undisputed that the day after the fire the Receiver tendered the car and the way-bill therefor to the Terminal Association,

and that Association declined to accept delivery by reason of the damaged condition of the car.

Q. Take Rock Island and Peoria car numbered a thousand and four, loaded with sash, door and blinds: what was done with that after the fire?

A. The agent of the Receiver of the C., P. & St. L. offered us a way-bill for the car, but we declined it.

Q. That was after the fire?

A. Yes, sir; the day following the fire. The car was then under their instructions placed for transfer opposite an empty car.

Q. Who placed it there?

A. The Terminal Association.

Q. At whose request?

A. Under the instructions of the agent of the Receiver of the C., P. & St. L.

Q. That service paid for?

A. Made a bill and sent it in to general office; presume it was paid. (Rec., 88.)

There is likewise no dispute over the fact that the Receiver never treated a car as having been delivered to the Terminal Association until he had delivered the way-bill therefor to that Association. For, until he had delivered the way-bill, he did not report the delivery of the car to the company whose car had thereby been delivered. To illustrate: A car belonging to the Chicago, Milwaukee and St. Paul Railway Company would arrive at East St. Louis over the Receiver's road on the 20th day of October. It would immediately be switched, as was the car here in controversy, from the Receiver's main track to some one of the tracks which he had the use of under his agreement with the Terminal Association. There it would remain standing until the Receiver delivered to that Association the customary way-bill therefor, which might not be until a day or so afterwards. Thereupon and on the day of the delivery of the way bill, and not until then,

the Terminal Association would take the car out of the Receiver's portion of the yard and take it to its portion of the yard, place it in a train and send it forward as directed by the way-bill. (Rec., 82.) And not until this was done did the Receiver notify the Chicago, Milwaukee and St. Paul Railway Company that he had on that day delivered its car to the Terminal Association. In other words: the Receiver did not report to the St. Paul Company that he had delivered its car to the Terminal Association at the time that Association switched it from his main track to his yard tracks, but did report such delivery when, and on the very day, he delivered the way-bill therefor, and not until then. This fact, in connection with the other fact that the Terminal Association never undertook to move or further transport cars that were standing in the Receiver's portion of the yard, which he used under his agreement with that Association, until it had received the way-bills therefor, proves conclusively that up to the time of the delivery of these way-bills the possession and control of the cars were with the Receiver, and not with the Terminal Association. As testified to by Felps, the agent of that Association:

"We had nothing to do with them at all until we received way-bills, if they stood there until doomsday." (Rec., 86.)

The car in controversy, which belonged to the Rock Island and Peoria Ry. Co. and numbered 1,004, had not been reported by the Receiver as delivered to the Terminal Association up to the time of the fire.

But counsel contends that the Receiver having transported this car to the end of his rails, he was thereby discharged from all further obligation. There are two answers to this contention.

1. The end of Receiver's main track was not the end of his rails. As between him and the respondent, his rails extended into the yards of the Terminal Association, so far as he had the use of the yard tracks of that Association under his agreement; and, as between him and the respondent, these yard tracks were his tracks, and the engine and crew which switched the car from his main tracks to these tracks were likewise his.

2. This car was consigned from Dubuque, Iowa, to Birmingham, Alabama. The Receiver came into possession of it as a connecting carrier. It was his duty to transport it to the end of his line of road and there deliver it to the next succeeding carrier; and until he had dispossessed himself of the possession of the car and had invested the Terminal Association therewith, he held the car as a carrier. Now, he could neither divest himself of possession of the car, nor invest the Terminal Association therewith until he had delivered to that Association the customary way-bill therefor. Until that was done he retained the absolute control and direction of the car, for the Terminal Association was without knowledge of the consignee, route, destination or contents of the car, and therefore was powerless to move the car or to forward it on to its destination. The situation is aptly stated by Judge Jenkins in his opinion:

"I have sought to show that there had been no delivery of these cars to the Terminal Association. It had not knowledge of their destination. It had not knowledge of the consignees of them. They were subject to the direction and control of the Receiver. The Terminal Association under its contract with the Receiver had placed these cars upon these tracks for the Receiver, and for a compensation agreed upon. It therein was the agent of the Receiver. It could not know whether these cars were to be transported over its line or the lines of the Wiggins

Ferry Company; it could not know in what direction they were to be transported or their ultimate destination. When it had placed the cars on these tracks pursuant to its contract with the Receiver, it had nothing further to do with them until the Receiver had dispossessed himself of possession and control and had invested the Terminal Association therewith." (Rec., 391.)

Counsel also argues that the Terminal Association in switching cars from the Receiver's main track to his yard tracks was acting as a connecting carrier. Nothing of the kind. It was performing a switching service for the Receiver, because the Receiver had no facilities of his own at that point. It did for the Receiver just what he would have done for himself had he owned the usual terminal and switching facilities. In doing this switching the Terminal Association did not undertake nor assume to receive possession of the cars as a connecting carrier. It was paid for this service which it rendered the Receiver fifty cents a car; and one carrier does not pay another carrier fifty cents a car or any other sum for the privilege of delivering cars to it for further transportation. The Receiver did not undertake to deliver cars to the Terminal Association, nor did that Association assume to accept delivery of cars from the Receiver for further transportation, unless such delivery was tendered by the delivery of the customary way-bill; for without that it could not forward them to their destination nor make delivery of them to the consignee or next succeeding carrier, whichever the case might be.

Counsel also contends that the end of Receiver's main track, which he calls the "Y," was the designated place of delivery to the Terminal Association. This is not so. Receiver's train (for it was a train as it was left standing on this "Y" track) was not left there for the purpose

of making a delivery of it *there* to the Terminal Association—many of the cars would probably never be forwarded beyond East St. Louis—but was left there for the purpose of having the cars composing the train switched to the tracks which the Receiver had the use of under his agreement with that Association, there to remain until the Receiver was prepared to make delivery of them, either to the Terminal Association or to the Wiggins Ferry Company, at which time he would deliver the proper way-bill and thereby tender delivery of the cars. The claim of opposing counsel that where there is a designated place of deposit delivery is made by such deposit, applies only to package freight, where the packages are addressed the same as a postal envelope is addressed, or to exceptional cases where by local custom the placing of a car on a certain track by the delivering company is notice to the receiving company that such car is to be taken to a *certain* place and to a *certain* person. This is the equivalent of a way-bill. The case of *Missouri Pacific Railway Company* v. *Wichita Wholesale Grocery Co*, 55 Kansas, 525, cited by opposing counsel, supports our position. There the Frisco Railroad Company had brought a carload of sugar to Wichita for the Grocery Company. The Missouri Pacific Company had constructed a spur track from one of its switch tracks along an alley to the rear of the building occupied by the Grocery Company. It was the practice of the Frisco Company when it brought goods to Wichita which were to be delivered to the Grocery Company at its building, to place the cars upon the "Y" track, which was the delivery track as between the Frisco and Missouri Pacific Companies, and then notify that company that the cars were on the "Y" to be placed on the spur

track, the track which led through the alley to the rear of the building occupied by the Grocery Company. Upon receiving this notice, the Missouri Pacific Company would take the car and switch it to the spur track at the rear of the building of the Grocery Company. This practice was followed in the case cited. The car of sugar was placed on the "Y" track and the agent of the Missouri Company notified by the agent of the Frisco Company that it had been placed there and that it was to be placed on the spur track at the rear of the building occupied by the Grocery Company. The Missouri Pacific Company then knew all that it was necessary to know in order to move the car to the place of delivery. This notice and custom took the place of the way-bill which is ordinarily used between connecting carriers. The court can readily see that had this notice not been given there would not have been a delivery of this car to the Missouri Pacific Company, although it had been placed on the "Y" track. It took the notice to complete the delivery. The court below held that the Missouri Pacific Company held this car as a connecting carrier, and it is difficult to see how it could have held otherwise, for it had received the car into its possession with instructions to haul it to a certain place on one of its tracks and there make delivery of it to the consignee. The Missouri Pacific Company therefore knew the consignee, place of delivery and the contents of the car. This case does not apply to the Carr, Ryder & Engler claim in the sense that opposing counsel are seeking to make the application. Here the purpose of the Terminal Association in switching the cars from the Receiver's main track to the tracks which he used under his agreement with that Association, was not to accept a delivery of the cars but was simply to break

up the Receiver's train and place his cars upon certain of the Receiver's tracks, there to remain until the Receiver was ready to make a delivery of them and give directions for their further transportation. In the meantime, and until these directions were given, the Terminal Association was in absolute ignorance of the consignee, the destination, the route and contents of the cars. This information was all with the Receiver, and until he passed it over to the Terminal Association, either by delivering the customary way-bill or in some other manner which was equivalent thereto, he had not dispossessed himself of the possession of the cars or their contents, nor invested the Terminal Association therewith. And until this was done his liability as a carrier continued.

The claim that the Terminal Association was content to haul such cars as the car in question from the "Y" track to the tracks where they stood until way-bills therefor were delivered to the Terminal Association and there hold them until it could get further shipping directions, does not meet the argument. The switching of these cars by the Terminal Association was not a matter of content. That Association did this work because it was under contract to do it. The Receiver employed this service because he was without facilities of his own. When the switch engine of the Terminal Association hitched to the cars on the "Y" track and took them to the tracks which the Receiver had the use of, it had no knowledge whether they were to be hauled further, whether they were to be forwarded to St. Louis or to points further on, or the places to which they were to be sent or the persons to whom they were to be delivered. All that it knew was that it was switching cars from the Receiver's main track to certain other of his tracks, for which it received fifty cents a car. It

knew the numbers and initials of the cars, nothing further. Not until the Receiver delivered to it the customary way-bill containing the needed information did it concern itself further with these cars. Not until then was there a delivery of these cars. Not until then did the Terminal Association become a carrier of these cars. Up to that time they were in the possession of the Receiver, subject to his control and direction, and whatever handling there was of them by the switch engines of the Terminal Association was done for the purpose of breaking up the Receiver's trains and placing the cars on tracks which he used for storing and handling his cars, for which he paid a stated amount for each car so handled, and not for the purpose of making a delivery of them to that Association. The fact that the morning after the fire the Receiver tendered a way-bill for the car in question to the agent of the Terminal Association, and that agent, after inspecting the car and finding that it and its contents had been damaged by the fire, declined to accept delivery, shows conclusively that the Receiver had not at the time of the fire even tendered delivery of the car and that the Terminal Association had not accepted delivery of the car and would not until the way-bill had been received and the car named therein found to be in such condition as that it could be safely transported. We therefore claim that at the time of the fire the car in question had not been delivered to the Terminal Association. It had not even been tendered to it and therefore the Receiver is liable for the loss which the respondent company sustained.

It is also argued by counsel that under the terms of the contract under which the property in question was being transported, that the Receiver is not liable because he was not "*actually*" in the

possession of the property at the time of the fire, the claim being that the actual possession was with the Terminal Association. This claim, of course, is based on the assumption that the ownership of the track on which the car was standing at the time of the fire was in the Terminal Association, and, therefore, it held actual possession of the car. The answer to this claim is, that under the contract between the Receiver and the Terminal Association the tracks which he had the use of under such contract, as between him and the respondent, were his tracks, and the cars which he brought into East St. Louis and placed upon such tracks were his cars and were in his possession until he had divested himself of the possession thereof and had invested the Terminal Association therewith. The Receiver was in "actual" possession of this car, as much so as if he had owned the track on which it stood outright and the engine and crew which placed it there.

In conclusion, we desire to call the attention of the court to the petitions and briefs in support thereof, filed in the cases of the Chicago, Milwaukee and St. Paul Railway Company, the Huntting Elevator Company and Jacob Rau against C. H. Bosworth, the Receiver herein, which involve the same questions as are involved in this case, and which will be submitted to this court at the same time that the petition herein is submitted. In those cases the decrees of the Circuit Court, which were in favor of the parties above named, were reversed by the Circuit Court of Appeals by a divided court, Judges Woods and Showalter filing opinions reversing the decrees, while Judge Jenkins filed a dissenting opinion. In this case the decree of the Circuit Court was likewise in favor of the respondent, the Carr, Ryder & Engler Company, but was affirmed by the Circuit Court of Appeals, Judges Woods and Jenkins

filing opinions of affirmance, while Judge Showalter wrote a dissenting opinion. The question involved in each one of these four cases is, whether there had been a delivery of the property in question to the Terminal Association at the time of the fire. If there had not been a delivery of the car and its contents in the Carr, Ryder & Engler case, as a majority of the judges of the Circuit Court of Appeals held that there had not been, then there had not been a delivery of the cars and their contents in the three cases above named; for the essential facts, so far as they relate to the question of delivery, are the same in all of the cases. That the decision of the majority of the court is right in the Carr, Ryder & Engler case and wrong in the three other cases there can be no question. We therefore submit that the petitions for writs of certiorari in the cases of the Chicago, Milwaukee and St. Paul Railroad Company, the Huntting Elevator Company and Jacob Rau should be granted, and that the petition in the Carr, Ryder & Engler case should be denied.

Respectfully submitted.

GEO. R. PECK,
BURTON HANSON,
Counsel for Respondent.

No. 287.

Brf. of Peck, Cary & Hanson

Respondt

FILED
MAR 11 1899
JAMES H. McKENNEY,
Clerk.

Filed Mar. 11, 1899.

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1898

C. H. BOSWORTH, Receiver of the Chicago, Peoria and St. Louis Railway Company, *Petitioner*,

vs.

THE CARR, RYDER & ENGLER COMPANY, *Respondent*.

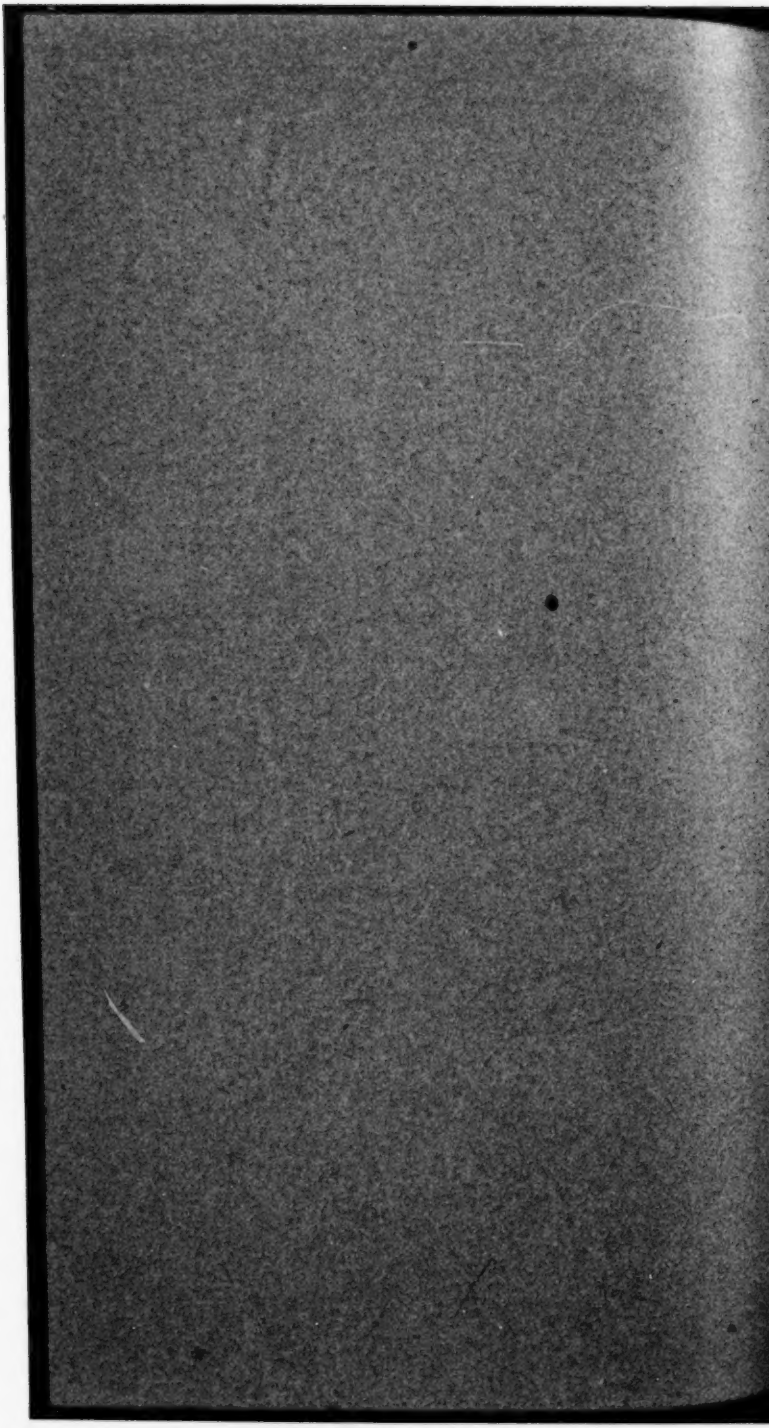
No. 287.

RESPONDENT'S BRIEF AND ARGUMENT.

GEO. R. PECK,
GEO. P. CARY,
SOLICITORS FOR RESPONDENT.

BURTON HANSON,
OF COUNSEL.

Sol Sydney Press Printing Company, 92 Dearborn St., Chicago.



IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1898.

C. H. BOSWORTH, Receiver of the Chicago, Peoria and St. Louis Railway Company, *Petitioner*,

vs.

THE CARR, RYDER & ENGLER COMPANY, *Respondent*,

No. 287.

RESPONDENT'S BRIEF AND ARGUMENT.

This case arises out of the same fire that do the cases of the Chicago, Milwaukee and St. Paul Railway Company, the Huntting Elevator Company and Jacob Rau against said Bosworth, as Receiver, Nos. 283, 284 and 285, and which will be presented to this court at the same time that this cause is presented.

The question, what constitutes a delivery of freight in carload lots, as between connecting carriers, is involved in each of the cases. In this case the decision of a majority of the judges of the Circuit Court of Appeals was against the Receiver—Judge Showalter dissenting—while in the three cases above mentioned the decision of a ma-

jority of the judges was in favor of the Receiver—Judge Jenkins dissenting—Judges Woods and Showalter disagreeing, however, as to the grounds upon which their decisions were placed.

Respondent was a dealer in manufactured sash, door and blinds at Dubuque, Iowa. On the 24th day of October, 1894, it delivered to the Chicago, Milwaukee and St. Paul Railway Company at Dubuque a carload of manufactured articles consigned to the May & Thomas Hardware Company, Birmingham, Alabama, by way of East St. Louis. The car was a car of the Rock Island and Peoria Railway Company and was numbered 1,004. In due course of transportation this car containing this property came into the possession of the Receiver's Company at Peoria, and was by that company transported to East St. Louis, the terminus of its road, where on the 28th day of October its contents were damaged by fire, the amount of the damage being seven hundred seventy-seven and 28-100 dollars ($777.28). At East St. Louis the Receiver's Company had no terminal facilities of its own. It therefore contracted with the Terminal Railroad Association for the necessary yard room and tracks for handling its cars, such as making and breaking up its trains, and switch engines and crews for switching its cars to and from its main track and the tracks which it had the use of under its agreement with that Association. The contract will be found on page 100 of the Rau record. Upon the arrival of the train which brought the car in question to East St. Louis, it stopped at the end of the main track of the Receiver's Company, which was what is known in railroad parlance as a "Y" track. There it stood until a switch engine and crew of the Terminal Association coupled to

it and switched the cars, including the car in question, to some one or more of the tracks which the Receiver's Company used under its agreement with that Association. For this service the Receiver's Company paid the Terminal Association fifty cents for each car so switched. Now, the contention of counsel for the Receiver is that the act of the Terminal Association in switching this car from the Receiver's main track to the tracks which he used under his agreement with that Association constituted a delivery of the car and its contents to that Association, and that thereby and thereupon his liability as a carrier terminated. Circuit Judges Woods and Jenkins held that it did not constitute a delivery; that without the delivery of the customary way-bill containing the names of the consignor, consignee, route and destination and contents of the car, there could be no delivery of the car or its contents. And this for the reason that in the absence of the delivery of a way-bill, or of information that was its equivalent, there could not, under the circumstances, be a delivery of the car. And further, without such a way-bill the Terminal Association would have no reason to assume that the car was to be further handled or transported by it, nor would it know what the car contained, where it was destined, to whom it was to be delivered or the route by which it was to be transported. It is conceded that the way-bill for this car and its contents had not been delivered by the Receiver to the Terminal Association at the time of the fire. *It is likewise undisputed that the day after the fire the Receiver tendered the car and the way-bill therefor to the Terminal Association, and that Association declined to accept delivery by reason of the damaged condition of the car.*

Q. Take Rock Island and Peoria car numbered a thousand and four, loaded with sash, door and blinds; what was done with that after the fire?

A. *The agent of the Receiver of the C., P. & St. L. offered us a way-bill for the car,* BUT WE DECLINED IT.

Q. That was after the fire?

A. Yes, sir; the day following the fire. The car was then under THEIR INSTRUCTIONS placed for transfer opposite an empty car.

Q. Who placed it there?

A. The Terminal Association.

Q. At whose request?

A. Under the instructions of the agent of the Receiver of the C., P. & St. L.

Q. That service paid for?

A. Made a bill and sent it in to general office; presume it was paid. (Rau Rec., 80.)

There is likewise no dispute over the fact that the Receiver never treated a car as having been delivered to the Terminal Association until he had delivered the way-bill therefor to that Association. For, until he had delivered the way-bill, he did not report the delivery of the car to the company whose car had thereby been delivered. To illustrate: A car belonging to the Chicago, Milwaukee and St. Paul Railway Company would arrive at East St. Louis over the Receiver's road on the 20th day of October. It would immediately be switched, as was the car here in controversy, from the Receiver's main track to some one of the tracks which he had the use of under his agreement with the Terminal Association. There it would remain standing until the Receiver delivered to that Association the customary way-bill therefor, which might not be until a day or so afterwards. Thereupon and on the day of the delivery of the way-bill, and not until then, the Terminal Association would take the car out of the Receiver's portion of the yard and take it to its portion

of the yard, place it in a train and send it forward as directed by the way-bill. (Rau Rec., 74, 75.) And not until this was done did the Receiver notify the Chicago, Milwaukee and St. Paul Railway Company that he had on that day delivered its car to the Terminal Association. In other words, the Receiver did not report to the St. Paul Company that he had delivered its car to the Terminal Association at the time that Association switched it from his main track to his yard tracks, but did report such delivery when, and on the very day, he delivered the way-bill therefor, *and not until then.* This fact, in connection with the other fact that the Terminal Association never undertook to move or further transport cars that were standing in the Receiver's portion of the yard, which he used under his agreement with that Association, until it had received the way-bills therefor, proves conclusively that up to the time of the delivery of these way-bills the possession and control of the cars were with the Receiver, and not with the Terminal Association. As testified to by Felps, the agent of that Association:

"We had nothing to do with them at all until we received way-bills, if they stood there until doomsday." (Rau Rec., 78.)

The car in controversy, which belonged to the Rock Island and Peoria Railway Company and numbered 1,004, had not been reported by the Receiver as delivered to the Terminal Association up to the time of the fire.

But counsel contends that the Receiver having transported this car to the end of his rails, he was thereby discharged from all further obligation. There are two answers to this contention:

1. The end of Receiver's main track was not the end

of his rails. As between him and the respondent, his rails extended into the yards of the Terminal Association, so far as he had the use of the yard tracks of that Association under his agreement; and, as between him and the respondent, these yard tracks were his tracks, and the engine and crew which switched the car from his main tracks to these tracks were likewise his.

2. This car was consigned from Dubuque, Iowa, to Birmingham, Alabama. The Receiver came into possession of it as a connecting carrier. It was his duty to transport it to the end of his line of road and there deliver it to the next succeeding carrier (*Ry. Co.* v. *Jones*, 155 U. S., 333); and until he had dispossessed himself of the possession of the car and had invested the Terminal Association therewith, he held the car as a carrier. Now, he could neither divest himself of possession of the car, nor invest the Terminal Association therewith, until he had delivered to that Association the customary way-bill therefor. Until that was done he retained the absolute control and direction of the car, for the Terminal Association was without knowledge of the consignee, route, destination or contents of the car, and, therefore, was powerless to move the car or to forward it on to its destination. The situation is aptly stated by Judge Jenkins in his opinion:

"I have sought to show that there had been no delivery of these cars to the Terminal Association. It had not knowledge of their destination. It had not knowledge of the consignees of them. They were subject to the direction and control of the Receiver. The Terminal Association under its contract with the Receiver had placed these cars upon these tracks for the Receiver, and for a compensation agreed upon. It therein was the agent of the Receiver. It could not know whether these cars were to be transported over its line or the lines of the Wiggins

Ferry Company; it could not know in what direction they were to be transported or their ultimate destination. When it had placed the cars on these tracks pursuant to its contract with the Receiver, it had nothing further to do with them until the Roceiver had dispossessed himself of possession and control and had invested the Terminal Association therewith." (Rau Rec., 354.)

Counsel also argues that the Terminal Association in switching cars from the Receiver's main track to his yard tracks was acting as a connecting carrier. Nothing of the kind. It was performing a switching service for the Receiver, because the Receiver had no facilities of his own at that point. It did for the Receiver just what he would have done for himself had he owned the usual terminal and switching facilities. In doing this switching the Terminal Association did not undertake nor assume to receive possession of the cars as a connecting carrier. It was paid for this service which it rendered the Receiver fifty cents a car; and one carrier does not pay another carrier fifty cents a car or any other sum for the privilege of delivering cars to it for further transportation. The Receiver did not undertake to deliver cars to the Terminal Association, nor did that Association assume to accept delivery of cars from the Receiver for further transportation, unless such delivery was tendered by the delivery of the customary way-bill; for without that it could not forward them to their destination nor make deliverv of them to the consignee or next succeeding carrier, whichever the case might be.

Counsel also contends that the end of Receiver's main track, which he calls the "Y," was the designated place of delivery to the Terminal Association. This is not so. Receiver's train (for it was a train as it was left standing on this "Y" track) was not left there for the purpose

of making a delivery of it *there* to the Terminal Association—many of the cars would probably never be forwarded beyond East St. Louis—but was left there for the purpose of having the cars composing the train switched to the tracks which the Receiver had the use of under his agreement with that Association, there to remain until the Receiver was prepared to make delivery of them, either to the Terminal Association or to the Wiggins Ferry Company, at which time he would deliver the proper way-bill and thereby tender delivery of the cars. The claim of opposing counsel that where there is a designated place of deposit delivery is made by such deposit, applies only to package freight, where the packages are addressed the same as a postal envelope is addressed, or to exceptional cases where by local custom the placing of a car on a certain track by the delivering company is notice to the receiving company that such car is to be taken to a *certain* place and to a *certain* person. This is the equivalent of a way-bill. The case of *Missouri Pacific Railway Company* v. *Wichita Wholesale Grocery Co.*, 55 Kansas, 525, cited by opposing counsel, supports our position. There the Frisco Railroad Company had brought a carload of sugar to Wichita for the Grocery Company. The Missouri Pacific Company had constructed a spur track from one of its switch tracks along an alley to the rear of the building occupied by the Grocery Company. It was the practice of the Frisco Company, when it brought goods to Wichita which were to be delivered to the Grocery Company at its building, to place the cars upon the "Y" track which was the delivery track as between the Frisco and Missouri Pacific Companies, and then notify that company that the cars were on the "Y" to be placed on the spur

track, the track which led through the alley to the rear of the building occupied by the Grocery Company. Upon receiving this notice, the Missouri Pacific Company would take the car and switch it to the spur track at the rear of the building of the Grocery Company. This practice was followed in the case cited. The car of sugar was placed on the "Y" track and the agent of the Missouri Company notified by the agent of the Frisco Company that it had been placed there and that it was to be placed on the spur track at the rear of the building occupied by the Grocery Company. The Missouri Pacific Company then knew all that it was necessary to know in order to move the car to the place of delivery. This notice and custom took the place of the way-bill which is ordinarily used between connecting carriers. The court can readily see that had this notice not been given there would not have been a delivery of this car to the Missouri Pacific Company, although it had been placed on the "Y" track. It took the notice to complete the delivery. The court below held that the Missouri Pacific Company held this car as a connecting carrier, and it is difficult to see how it could have held otherwise, for it had received the car into its possession with instructions to haul it to a certain place on one of its tracks and there make delivery of it to the consignee. The Missouri Pacific Company, therefore, knew the consignee, place of delivery and the contents of the car. This case does not apply to the Carr, Ryder & Engler claim in the sense that opposing counsel are seeking to make the application. Here the purpose of the Terminal Association in switching the cars from the Receiver's main track to the tracks which he used under his agreement with that Association was not to accept a delivery of the cars, but was simply to break

up the Receiver's train and place his cars upon certain of the Receiver's tracks, there to remain until the Receiver was ready to make a delivery of them and give directions for their further transportation. In the meantime, and until these directions were given, the Terminal Association was in absolute ignorance of the consignee, the destination, the route and contents of the cars. This information was all with the Receiver, and until he passed it over to the Terminal Association, either by delivering the customary way-bill or in some other manner which was equivalent thereto, he had not dispossessed himself of the possession of the cars or their contents, nor invested the Terminal Association therewith. And until this was done his liability as a carrier continued.

The claim that the Terminal Association was content to haul such cars as the car in question from the "Y" track to the tracks where they stood until way-bills therefor were delivered to the Terminal Association and there hold them until it could get further shipping directions, does not meet the argument. The switching of these cars by the Terminal Association was not a matter of content. That Association did this work because it was under contract to do it. The Receiver employed this service because he was without facilities of his own. When the switch engine of the Terminal Association hitched to the cars on the "Y" track and took them to the tracks which the Receiver had the use of, it had no knowledge whether they were to be hauled further, whether they were to be forwarded to St. Louis or to points further on, or the places to which they were to be sent or the persons to whom they were to be delivered. All that it knew was that it was switching cars from the Receiver's main track to certain other

of his tracks, for which it received fifty cents a car. It knew the numbers and initials of the cars, nothing further. Not until the Receiver delivered to it the customary way-bill containing the needed information did it concern itself further with these cars. Not until then was there a delivery of these cars. Not until then did the Terminal Association become a carrier of these cars. Up to that time they were in the possession of the Receiver, subject to his control and direction, and whatever handling there was of them by the switch engines of the Terminal Association was done for the purpose of breaking up the Receiver's trains and placing the cars on tracks which he used for storing and handling his cars, for which he paid a stated amount for each car so handled, and not for the purpose of making a delivery of them to that Association. *The fact that the morning after the fire the Receiver tendered a way-bill for the car in question to the agent of the Terminal Association, and that agent, after inspecting the car, and finding that it and its contents had been damaged by the fire, declined to accept delivery, shows conclusively that the Receiver had not at the time of the fire even tendered delivery of the car, and that the Terminal Association had not accepted delivery of the car and would not until the way-bill had been received and the car named therein found to be in such condition as that it could be safely transported.* (Rau Rec., 80.) We therefore claim that at the time of the fire the car in question had not been delivered to the Terminal Association. It had not even been tendered to it, and therefore the Receiver is liable for the loss which the respondent company sustained.

It is also argued by counsel that under the terms of the contract under which the property

in question was being transported, that the Receiver is not liable because he was not "*actually*" in the possession of the property at the time of the fire, the claim being that the actual possession was with the Terminal Association. This claim, of course, is based on the assumption that the ownership of the track on which the car was standing at the time of the fire was in the Terminal Association, and, therefore, it held actual possession of the car. The answer to this claim is, that under the contract between the Receiver and the Terminal Association the tracks which he had the use of under such contract, as between him and the respondent, were his tracks, and the cars which he brought into East St. Louis and placed upon such tracks were his cars and were in his possession until he had divested himself of the possession thereof and had invested the Terminal Association therewith. The Receiver was in "actual" possession of this car, as much so as if he had owned the track on which it stood outright and the engine and crew which placed it there.

The attention of the court is called to our brief filed in the cases of the Chicago, Milwaukee and St. Paul Railway Company, the Huntting Elevator Company and Jacob Rau against C. H. Bosworth, the Receiver herein, which involve substantially the same questions as are involved in this case, and which will be submitted to this court at the same time that this case is submitted. In those cases the decrees of the Circuit Court, which were in favor of the parties above named, were reversed by the Circuit Court of Appeals by a divided court, Judges Woods and Showalter filing opinions reversing the decrees, while Judge Jenkins filed a dissenting opinion. In this case the decree of the Circuit Court was likewise in favor of the respondent, the Carr, Ryder & Engler Company, and was affirmed by

the Circuit Court of Appeals, Judges Woods and Jenkins filing opinions of affirmance, while Judge Showalter wrote a dissenting opinion. For opinions see Rau Rec., 340–364. The question involved in each one of these four cases is, whether there had been a delivery of the property in question to the Terminal Association at the time of the fire. If there had not been a delivery of the car and its contents in the Carr, Ryder & Engler case, as a majority of the judges of the Circuit Court of Appeals held that there had not been, then there had not been a delivery of the cars and their contents in the three cases above named; for the essential facts, so far as they relate to the question of delivery, are the same in all of the cases. That the decision of the majority of the court below is right in the Carr, Ryder & Engler case and wrong in the three other cases there can be no question.

In Conclusion.

The fact that the day after the fire the agent of the Receiver tendered the car in question, being Rock Island and Peoria Railroad Company car No. 1,004, to the Terminal Association, by offering a way-bill therefor; that that Association declined to receive it, and that thereupon such car, under the instructions of the Receiver, was placed opposite an empty car for the purpose of transferring the damaged sash, doors and blinds into such empty car, and that the Receiver paid the Terminal Association for that service, is conclusive proof that there had been no delivery of the car and its contents to the Terminal Association before the fire, and that the Receiver held possession of it, and regarded himself as being in possession of it at the time of the fire.

The following testimony given by Mr. Felps, the agent of the Terminal Association at East St. Louis, which testimony is uncontradicted, is more potent than argument of counsel or citation of authority, and renders both unnecessary:

"Q. Take Rock Island and Peoria car number a thousand and four, loaded with sash, doors and blinds; *what was done with that after the fire?*

A. *The agent of the Receiver of the C., P. and St. L. offered us a way-bill for the car, but we declined it.*

Q. *That was after the fire?*

A. *Yes, sir; the day following the fire; the car was then under their instructions placed for transfer opposite an empty car.*

Q. Who placed it there?

A. The Terminal Association.

Q. At whose request?

A. Under the instructions of the agent of the Receiver of the C., P. & St. L.

Q. That service paid for?

A. Made a bill and sent it into general office; presume it was paid." (Rau Rec., 80.)

Respectfully submitted.

GEO. R. PECK,
GEO. P. CARY,
Solicitors for Respondent.

BURTON HANSON,
Of Counsel.

Supreme Court of the United States.

No. 14.—October Term, 1900.

C. H. Bosworth, Receiver of the Chicago, Peoria and St. Louis Railway, Petitioner, *vs.* The Carr, Ryder and Engler Company. } On writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

[December 17, 1900.]

Mr. Justice White delivered the opinion of the Court.

The claim presented on this record was for the value of a quantity of manufactured doors, sash, blinds and moldings, shipped from Dubuque, Iowa, on October 20, 1894, and consigned to the May & Thomas Hardware Company, Birmingham, Alabama, by way of East St. Louis. The car containing the merchandise in question was received by the Peoria Company from the connecting carrier, and, at about three o'clock on the afternoon of October 28, 1894, was deposited in its portion of the yard of the Terminal Association at East St. Louis set apart for the use of the Peoria Company, under the agreement referred to in the opinion just delivered in *Huntting Elevator Company* v. *Bosworth*, number 12 of this term. On the night of the date last mentioned the car and contents were destroyed by the same fire which consumed or damaged the property of the Huntting Elevator Company. Both of the courts below decreed the liability of the Peoria Company, the Court of Appeals declaring that "though in the physical possession, under its agreement with the receiver, of the car in which the goods were being transported, the Terminal Association had not become responsible as a carrier therefor, because it had not been put in possession of a way bill or other form of information on which it could proceed with the carriage." It necessarily results from the views expressed by us in the Huntting Elevator Company case that the courts below did not err in the decrees rendered by them upon this claim.

The decree of the Circuit Court of Appeals, affirming that of the Circuit Court, is accordingly

Affirmed.